Supreme Court, U.S.
FILED
MAR 29 2005
OFFICE OF THE CLERK

(12)

No. 04-368

In the Supreme Court of the United States

ARTHUR ANDERSEN LLP, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

KANNON K. SHANMUGAM
Assistant to the Solicitor General

ELIZABETH D. COLLERY
SANGITA K. RAO
ANDREW WEISSMANN
MATTHEW W. FRIEDRICH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner is entitled to relief from its conviction for corruptly persuading its employees with the intent to cause them to withhold documents from, or alter documents for, an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B), on the theory that:

(a) the jury was incorrectly instructed that the term "corruptly" means "having an improper purpose" "to subvert, undermine, or impede the fact-finding ability of an official proceeding"; and

(b) the jury was not instructed that Section 1512(b) requires proof that petitioner believed that some particular "official proceeding" was likely to occur in the near future, and was incorrectly instructed that an "official proceeding" includes an informal investigation by the Securities and Exchange Commission.

TABLE OF CONTENTS

	Page
Statement	1
Summary of argument	14
Argument:	
Petitioner was properly convicted of corruptly persuading its employees with the intent to cause them to withhold documents from, or alter documents for, an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B)	16
I. The district court correctly instructed the jury on the definition of the term "corruptly"	16
A. The lower courts correctly defined the term "corruptly" as "having an improper purpose" "to subvert, undermine, or impede the fact-finding ability of an official proceeding"	17
1. The term "corruptly" is similarly defined in other obstruction-of-justice statutes	17
2. Petitioner's criticisms of the lower courts' definition are unfounded	22
B. Petitioner's novel definition of the term "corruptly" should be rejected	29
1. The term "corruptly" does not require "proof of improper means of persuasion" or "inducement to unlawful acts"	29
2. The term "corruptly" does not require "consciousness of wrongdoing"	35
C. Neither the rule of lenity, the doctrine of constitutional doubt, nor principles of "fair warning" justify petitioner's construction	38

Table of Contents—Continued: Page

II. The district court correctly instructed the jury on the definition of the phrase "official proceeding" 42
A. Petitioner's proposed "nexus" requirement should be rejected 42
B. Petitioner's challenge to the district court's "official proceeding" instruction should be rejected 47
Conclusion 50
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Bryan v. *United States*, 524 U.S. 184 (1998) 35, 36
California Motor Transp. Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 39
Cheek v. *United States*, 498 U.S. 192 (1991) 36
Craig v. *Harney*, 331 U.S. 367 (1947) 39
Johnson v. *United States*, 520 U.S. 461 (1997) 43
Lewy v. *Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988) 27
Lockhart v. *Nelson*, 488 U.S. 33 (1988) 41
Miller v. *French*, 530 U.S. 327 (2000) 39
Morrissette v. *United States*, 342 U.S. 246 (1952) 20
NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) 39
Neder v. *United States*, 527 U.S. 1 (1999) 47
Pettibone v. *United States*, 148 U.S. 197 (1893) 22, 44
Ratzlaf v. *United States*, 510 U.S. 135 (1994) 36, 37
Rice v. *United States*, 356 F.2d 709 (8th Cir. 1966) 48
Salinas v. *United States*, 522 U.S. 52 (1997) 20, 38
Standard Oil Co. v. *United States*, 221 U.S. 1 (1911) 20

Cases—Continued: Page

Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V. v. *Schreiber*, 327 F.3d 173 (2d Cir. 2003) 25
United States v. *A&P Trucking Co.*, 358 U.S. 121 (1958) 10
United States v. *Abrams*, 427 F.2d 86 (2d Cir.), cert. denied, 400 U.S. 832 (1970) 21
United States v. *Aguilar*, 515 U.S. 593 (1995) 19, 25, 28, 32, 37, 39, 44
United States v. *Applewhaite*, 195 F.3d 679 (3d Cir. 1999) 40
United States v. *Batten*, 226 F. Supp. 492 (D.D.C. 1964), cert. denied, 380 U.S. 912 (1965) 49
United States v. *Bonito*, 57 F.3d 167 (2d Cir. 1995), cert. denied, 516 U.S. 1049 (1996) 26
United States v. *Brady*, 168 F.3d 574 (1st Cir. 1999) 31
United States v. *Brooks*, 111 F.3d 365 (4th Cir. 1997) 18
United States v. *Browning, Inc.*, 572 F.2d 720 (10th Cir.), cert. denied, 439 U.S. 822 (1978) 48, 49
United States v. *Davis*, 183 F.3d 231 (3d Cir.), amended on reh'g, 197 F.3d 662 (3d Cir. 1999) 29, 44
United States v. *Fleming*, 215 F.3d 930 (9th Cir. 2000) 18
United States v. *Fruchtman*, 421 F.2d 1019 (6th Cir.), cert. denied, 400 U.S. 849 (1970) 48, 49
United States v. *Gabriel*, 125 F.3d 89 (2d Cir. 1997) 44
United States v. *Gravely*, 840 F.2d 1156 (4th Cir. 1988) 40
United States v. *Harriss*, 347 U.S. 612 (1954) 39
United States v. *Hernandez*, 730 F.2d 895 (2d Cir. 1984) 20
United States v. *Howard*, 569 F.2d 1331 (5th Cir.), cert. denied, 439 U.S. 834 (1978) 19

Cases—Continued: Page

United States v. *Jackson*, 607 F.2d 1219 (8th Cir. 1979), cert. denied, 444 U.S. 1080 (1980) 19
United States v. *Jeter*, 775 F.2d 670 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986) 18
United States v. *Kelley*, 36 F.3d 1118 (D.C. Cir. 1994) 49
United States v. *Kellington*, 217 F.3d 1084 (9th Cir. 2000) 29
United States v. *Kloess*, 251 F.3d 941 (11th Cir. 2001) 29
United States v. *Laurins*, 857 F.2d 529 (9th Cir. 1988), cert. denied, 492 U.S. 906 (1989) 21
United States v. *Leo*, 941 F.2d 181 (3d Cir. 1991) 48
United States v. *Machi*, 811 F.2d 991 (7th Cir. 1987) 18
United States v. *Mitchell*, 877 F.2d 294 (4th Cir. 1989) 19, 31
United States v. *North*, 910 F.2d 843 (D.C. Cir.), modified on reh'g, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991) 19, 28
United States v. *Ogle*, 613 F.2d 233 (10th Cir. 1979), cert. denied, 449 U.S. 825 (1980) 18, 31
United States v. *Olano*, 507 U.S. 725 (1993) 43
United States v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), cert. denied, 506 U.S. 1021 (1992) 19, 21, 27, 28
United States v. *Rasheed*, 663 F.2d 843 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982) 18
United States v. *Reeves*, 752 F.2d 995 (5th Cir.), cert. denied, 474 U.S. 834 (1985) 25
United Stafes v. *Rooney*, 37 F.3d 847 (2d Cir. 1994) 25
United States v. *Ruggiero*, 934 F.2d 440 (2d Cir. 1991) 40
United States v. *Schwartz*, 283 F.3d 76 (2d Cir. 2002) 18

Cases—Continued: Page

United States v. *Senffner*, 280 F.3d 775 (7th Cir.), cert. denied, 536 U.S. 934 (2002) 49, 50
United States v. *Shabani*, 513 U.S. 10 (1994) 38
United States v. *Shotts*, 145 F.3d 1289 (11th Cir. 1998), cert. denied, 525 U.S. 1177 (1999) 20, 40
United States v. *Strand*, 574 F.2d 993 (9th Cir. 1978) 25
United States v. *Tackett*, 113 F.3d 603 (6th Cir. 1997), cert. denied, 522 U.S. 1089 (1998) 20
United States v. *Thompson*, 76 F.3d 442 (2d Cir. 1996) 39, 40
United States v. *Wells*, 519 U.S. 482 (1997) 38
United States v. *Williams*:
504 U.S. 36 (1992) 43, 47
990 F.2d 507 (9th Cir.), cert. denied, 510 U.S. 926 (1993) 43
Virginia v. *Hicks*, 539 U.S. 113 (2003) 38
Wilder v. *United States*, 143 F. 433 (4th Cir. 1906), cert. denied, 204 U.S. 674 (1907) 40

Constitution, statutes, regulations and rules:

U.S. Const.:
Amend. I 38, 39
Amend. V 28
Act of Mar. 2, 1831, ch. 99, § 2, 4 Stat. 487 17
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181:
§ 7029(a), 102 Stat. 4397 20
§ 7029(c), 102 Stat. 4398 20
Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, 116 Stat. 800 23
Victim and Witness Protecton Act of 1982, Pub. L. No. 97-291, § 4(a), 96 Stat. 1248 19
15 U.S.C. 78u(a) 48, 15a
15 U.S.C. 78u(b) 48, 16a
15 U.S.C. 78dd-2 25

Statutes, regulations and rules—Continued: Page

18 U.S.C. 2(b) 31
18 U.S.C. 201 25
18 U.S.C. 201(b)(3) 31
18 U.S.C. 666(a) 25
18 U.S.C. 873 31
18 U.S.C. 1032 25
18 U.S.C. 1503 ..... *passim*, 1a
18 U.S.C. 1505 ..... *passim*, 2a
18 U.S.C. 1512 (2000 & Supp. II 2002) ..... *passim*, 3a, 6a
18 U.S.C. 1512(b) (2000 & Supp. II 2002) ..... *passim*, 3a, 8a
18 U.S.C. 1512(b)(2) 38, 41, 3a
18 U.S.C. 1512(b)(2)(A) 1, 10, 14, 16, 24, 46, 50, 4a
18 U.S.C. 1512(b)(2)(B) 1, 10, 14, 16, 24, 50, 4a
18 U.S.C. 1512(c) (2000) 33, 34, 4a
18 U.S.C. 1512(c) (Supp. II 2002) 21, 23, 33, 34, 8a
18 U.S.C. 1512(d) (Supp. II 2002) 33, 9a
18 U.S.C. 1512(e)(1) (2000) 13, 22, 32, 42, 44, 46, 5a
18 U.S.C. 1512(f)(1) (2000) 46, 5a
18 U.S.C. 1512(f)(1) (Supp. II 2002) 22, 10a
18 U.S.C. 1512(g)(1) (Supp. II 2002) 46, 10a
18 U.S.C. 1515(a)(1) 47, 48, 11a
18 U.S.C. 1515(a)(3) 33, 11a
18 U.S.C. 1515(a)(6) 33, 13a
18 U.S.C. 1515(b) 21, 33, 13a
18 U.S.C. 1515(c) 29, 33, 41, 13a
18 U.S.C. 1517 25
18 U.S.C. 1519 (Supp. II 2002) 23, 13a
18 U.S.C. 1520 (Supp. II 2002) 23, 13a
18 U.S.C. 1622 31
26 U.S.C. 7212(a) 25, 17a
17 C.F.R.:
Section 201.100(b)(1) 48
Section 201.101(a) 48
Section 201.102(e)(1)(ii) 3
Section 201.102(e)(1)(iv) 3
Section 202.5(a) 48, 17a

Rules—Continued: Page

Fed. R. Crim. P. 52(b) 43
Fed. R. Evid. 606(b) 40

Miscellaneous:

128 Cong. Rec. (1982):
p. 26,350 34
p. 26,810 34
134 Cong. Rec. 32,701 (1988) 20, 35
141 Cong. Rec. 14,956 (1995) 21
142 Cong. Rec. 25,468 (1996) 21
2 Edward J. Devitt & Charles B. Blackmar, *Federal Jury Practice & Instructions* (3d ed. 1977) 25
27 Fed. Reg. (1962):
p. 4609 49
p. 4610 49
H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1 (1990) 25
Ninth Circuit Manual of Model Jury Instructions (Criminal) (2003) 19
2A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions: Criminal* (5th ed. 2000) 18
Michael R. Overly & Chanley T. Howell, *Document Retention in the Electronic Workplace* (2001) 27
18 *Oxford English Dictionary* (2d ed. 1989) 30
S. Rep. No. 532, 97th Cong., 2d Sess. (1982) 23, 32, 34
S. Rep. No. 146, 107th Cong., 2d Sess. (2002) 23, 24
2 Leonard B. Sand et al., *Modern Federal Jury Instructions: Criminal* (2004) 18
Bruce G. Vanyo & Terry T. Johnson, *The Pretrial Phase: A Practical Guide for the Non-Litigator* 584 PLI/Corp. 247 (1987) 27
W. Russell Welsh & Andrew C. Marquardt, *Spoliation of Evidence*, 23 WTR Brief 9 (1994) 27

STATEMENT

This case arises from the response of petitioner, then one of the world's "Big Five" auditing firms, to anticipated and actual government investigations into the accounting practices of its client, Enron Corporation. In order to limit scrutiny by the Securities and Exchange Commission (SEC) of petitioner's conduct in connection with Enron's improper accounting practices, petitioner instructed its employees to undertake an unprecedented campaign of document destruction. Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of corruptly persuading persons with the intent to cause them to withhold documents from, or alter documents for, an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B).[1] The court of appeals affirmed. Pet. App. 1a-34a.

1. Enron was one of the nation's largest companies and one of petitioner's largest clients. Petitioner's "Enron engagement team" consisted of more than 100 accountants, and petitioner billed Enron approximately $58 million in the year 2000. Enron employed highly aggressive accounting practices, and petitioner treated Enron as a "high-risk" client. Petitioner nevertheless had an unusually close relationship with Enron. David Duncan, the Andersen partner who led the Enron engagement team, was known as a strong "client advocate," and petitioner bent over backward to accommodate Enron. Pet. App. 3a; Tr. 796-804, 819-823, 940-942, 1173, 1687, 1739-1742, 1847-1848, 3270, 5357, 5529-5532, 5536-5547; GX 304A.

On August 14, 2001, Enron chief executive officer Jeffrey Skilling unexpectedly resigned, leading to widespread speculation about financial problems at Enron and further

---

[1] In 2002, Congress amended 18 U.S.C. 1512(b) in respects not relevant to this litigation. All references to Section 1512(b) in this brief are to the 2000 version.

depressing the already declining value of Enron's stock. Within days of Skilling's resignation, Sherron Watkins, a senior Enron accountant who had previously worked for petitioner, warned Kenneth Lay, Enron's newly reappointed CEO, that Enron could "implode in a wave of accounting scandals." Watkins simultaneously conveyed her warnings to petitioner, and they were discussed by Duncan, in-house counsel, and senior management. On August 28, an article in the *Wall Street Journal* suggested improprieties at Enron, and the SEC opened an informal investigation. Pet. App. 4a; Tr. 655-664, 1807-1817, 2804; GXs 821A, 828B.

In September 2001, high-level Andersen personnel learned of serious accounting problems at Enron and began to anticipate an SEC investigation and civil litigation. Specifically, they discovered that the Enron engagement team had approved the use of an improper accounting technique for four "Raptors," special-purpose entities that Enron had used to engage in "off-balance-sheet" activities. To conceal the fact that some of the Raptors had suffered severe losses, the Enron engagement team had allowed Enron to aggregate the four Raptors for accounting purposes. Petitioner's own accounting experts had deemed that technique a "black-and-white" violation of GAAP. While examining that issue, moreover, high-level Andersen personnel learned that Enron and petitioner had made a separate $1.2 billion accounting error in Enron's favor, which would require, at a minimum, that Enron reduce its outstanding shareholder equity by that amount in an upcoming SEC filing. Pet. App. 3a-4a, 6a; Tr. 942-952, 970-971, 1773-1781, 1833-1840, 5413-5414, 5572, 5578.

Petitioner had particular reason to be concerned about the prospect of an SEC investigation. In June 2001, petitioner had agreed to pay a record $7 million fine to settle an SEC action arising from its audit work for Waste Management, Inc. As part of that settlement, the SEC censured petitioner, and petitioner was enjoined from committing any fu-

ture violations of the securities laws. As a result, petitioner was effectively on probation with the SEC. See 17 C.F.R. 201.102(e)(1)(ii) and (iv) (allowing SEC to disbar accountants for "repeated instances of unreasonable conduct"). In July, the SEC had filed an amended complaint against, among others, the lead Andersen partner on an audit for Sunbeam Corporation, contending that Sunbeam's financial statements were materially false or misleading. In connection with that complaint (as it had in the Waste Management investigation), the SEC had issued a formal subpoena to petitioner for records relating to the audit. In light of the Waste Management and Sunbeam investigations, petitioner was anxious to avoid any further sanction or censure. J.A. 93; Pet. App. 4a, 11a-12a; Tr. 448-484, 1764-1765; GXs 621A, 626A, 1026A, 3036, NT Undated.

In late September 2001, petitioner began to prepare for Enron-related legal action, including SEC document requests. By that time, Duncan had already concluded that the SEC might issue such requests. Petitioner assembled an Enron crisis-response group, composed of high-level partners and in-house counsel. By September 28, the group was convening almost daily. On October 8, petitioner retained the law firm of Davis Polk & Wardwell to represent it in any Enron-related litigation. J.A. 161-162; Pet. App. 4a; Tr. 4182-4183, 4519-4522.

Nancy Temple was an Andersen in-house lawyer with responsibility for Enron-related matters. On October 9, Temple discussed Enron with other in-house counsel. In her notes from the meeting, Temple acknowledged that "some SEC investigation" was "highly probable"; that, even if petitioner's accounting experts were able to develop an alternative methodology for the Raptors, there was a "reasonable possibility [that the Raptors issue] will force a restatement" of Enron's previously filed financial statements; and that, absent an alternative methodology, there would be a "restatement and probability of charge of violating [the injunc-

tion] in Waste Management." On October 12, Temple entered the Enron matter in the computer system that petitioner used to track its open legal matters. In doing so, she designated the matter as a "government/regulatory investigation." J.A. 93, 125-132; Pet. App. 5a.[2]

Concerned about the record that the SEC and other litigants would uncover, petitioner decided to purge material from its files under the guise of enforcing its document retention policy. That policy required petitioner to maintain a single central engagement file of its working papers, which contained "only that information which [was] relevant to *supporting* [petitioner's] work." J.A. 45 (emphasis added). All other paper and electronic documents (including drafts, handwritten notes, and e-mails) were to be destroyed when they were "no longer useful to the engagement." J.A. 45, 47, 58. The policy, however, provided that, "in cases of threatened litigation, no related information will be destroyed." J.A. 44. The policy further specified that "related information should not be destroyed" (J.A. 65) whenever, in the

[2] Petitioner believed that an SEC request for its documents would be "likely" even if the SEC did not ultimately conclude that Enron would have to restate its *earnings* (or income). Temple knew, from studying the Waste Management and Sunbeam matters, that the SEC might request documents from petitioner before a restatement was filed. And although Andersen partner John Riley claimed to have believed that the SEC would subpoena petitioner's records only if Enron restated its earnings, and not its assets (or balance sheet), that claim was substantially impeached by his testimony during the Sunbeam matter, in which he acknowledged knowing from the first sign of adverse publicity that petitioner was going to have a problem with an SEC investigation. Riley also acknowledged that he was unaware of critical facts bearing on the likelihood of an SEC proceeding relating to Enron. Finally, there is no evidence that Temple, Duncan, or the SEC shared Riley's view. In fact, an SEC official testified that *any* restatement by a large public company would result in a formal SEC investigation "almost without fail," and another SEC official testified that the SEC intended to seek information from petitioner even before any restatement occurred. Tr. 424, 448-459, 783-784, 5888, 6008-6009, 6093-6096, 6120, 6198; GX NT Undated, at A-004609.

words of a separate policy incorporated by reference, "professional practice litigation against [petitioner] or any of its personnel has been commenced, has been threatened or is judged likely to occur, or when governmental or professional investigations that may have involved [petitioner] or any of its personnel have been commenced or are judged likely." J.A. 29-30.[3] Many Andersen employees were unaware of the details of the document policy. Actual compliance with the policy was spotty, and the Enron engagement team was notoriously lax in that respect. Tr. 1201, 1625-1626, 1883, 1895, 2790-2793, 3331-3338, 4830, 4867-4873, 5294-5295.

Notwithstanding the facts that (1) petitioner had retained outside counsel; (2) Temple had concluded that "some SEC investigation" was "highly probable"; (3) Temple had designated the Enron matter as a "government/regulatory investigation"; and (4) petitioner's work for Enron was ongoing, Temple and others embarked on a campaign to encourage Andersen employees to destroy Enron-related documents, under the guise of complying with the document policy. On October 10, Michael Odom, practice director for petitioner's Houston office, urged an audience of Andersen personnel (including members of the Enron engagement team) to comply with the policy. Odom explained that, "if [a document is] destroyed in the course of the normal policy and litigation is filed the next day, that's great. * * * [W]e've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable." Odom later admitted that his remarks were prompted by a conference call with the Enron crisis-response group. Shortly before

[3] In an official memo explaining the document policy, circulated to all Andersen personnel, petitioner stated that, "if there is a current expectation that * * * access [to the working papers] will be sought [by an external source]," and "if working papers are still in the process of being assembled," then "all extraneous materials should be preserved." GX 1023M. At all relevant times, the Enron working papers had not yet been assembled. Tr. 1881-1882, 3335.

the meeting, Odom himself deleted an unusual volume of electronic documents. For her part, Temple e-mailed Odom on October 12—after she had learned that the Enron engagement team had not been following the document policy, and just minutes after designating the Enron matter as a "government/regulatory investigation." In the e-mail, which Odom forwarded to Duncan, Temple suggested that Odom "remind[] the engagement team of our documentation and retention policy," and added that compliance "will be helpful." J.A. 94, 156-157; Pet. App. 5a; Tr. 1881-1883, 3335, 4175-4176, 6252; GXs 1010A-1010D.

In the days that followed, Enron's predicament worsened. On October 16, Enron issued a press release announcing that it was taking a $1.01 billion charge to its current earnings.[4] In a conference call with analysts later that day, Lay announced that Enron was also reducing its outstanding shareholder equity by approximately $1.2 billion. Those announcements triggered another wave of negative publicity. On October 17, the SEC notified Enron by letter of its investigation and requested certain information and documents. The SEC separately told Enron that its investigation was a "high-priority matter" and "very serious." On October 19, Enron forwarded a copy of the SEC's letter to petitioner. J.A. 103-119; Pet. App. 5a-6a; Tr. 680, 1841-1846, 1850-1852; GXs 1016A-1016B, 1019C-1019D.

In the wake of the SEC letter, Temple and others redoubled their efforts to purge Enron-related material from petitioner's files. On October 19, Temple sent an e-mail attaching the policy to a member of petitioner's internal team of

[4] In the press release, Enron characterized the charge to earnings as "non-recurring," even though petitioner had informed Enron that it believed that the term was misleading. When Enron refused to alter the press release, Temple requested that an internal Andersen memo regarding the press release be revised to delete any reference to petitioner's belief that the press release was "misleading." J.A. 95-102, 149-150; Pet. App. 5a-6a; Tr. 967-968, 1795-1807, 5591-5592.

accounting experts, thereby causing team members to delete hundreds of Enron-related e-mails. On the morning of Saturday, October 20, the Enron crisis-response group convened by telephone to discuss the SEC letter. During that conference call, Temple twice instructed the members of the group to "[m]ake sure to follow the [document] policy." Pet. App. 6a; Tr. 978-985, 1622-1644, 1853-1862; GXs 1019A, 3004A.

On October 23, in a conference call with analysts, Enron CEO Lay declined to answer certain questions because of "potential lawsuits, as well as the SEC inquiry." By that date, Duncan had concluded that the $1.2 billion error would require a restatement. After the October 23 conference call, Duncan met with other partners on the Enron engagement team and explained that they should ensure that team members were in compliance with the document policy. Duncan took that step in light of "[t]he continued escalating events surrounding Enron," including "the filing of lawsuits and the SEC inquiry." Duncan then called an "URGENT" and "mandatory" meeting for all members of the Enron engagement team, in which he distributed copies of the document policy and ordered compliance with it. As Duncan later acknowledged, "certainly the threat of potential civil litigation or SEC questions * * * were *[sic]* on our mind." Partners then fanned out and held smaller meetings with their supervisees, discussing the SEC investigation and confirming the need for compliance with the policy. Members of the Enron engagement team were instructed to make document destruction a priority, despite the mounting pressure they faced in dealing with Enron's underlying accounting problems. One Andersen partner told a manager that it was important to clean up the files because "we may be subpoenaed," and an Andersen employee said in an e-mail to other employees that the order to destroy documents "came from the partner group and is considered VERY important." Similar instructions went out to other Andersen offices that

dealt with Enron matters, though at least one supervisor in another office refused to comply. That supervisor later explained his reaction as follows: "[I]f you think there is going to be some requirement to produce these documents, then don't destroy anything. For God's sake, just don't do that." J.A. 150-159, 168-169; Tr. 1849-1850, 1874-1881, 1886-1894, 1902-1905, 3241-3242, 4088-4089, 4791-4800, 4952, 4965, 5009, 5115, 5158-5168, 5210; GXs 1023F, 1023R, 1024E-1024F.

Following management's instructions, the Enron engagement team destroyed documents at an unprecedented clip. In fact, because the onsite shredder was operating at full capacity, additional documents had to be shipped to another office for shredding. A chart showing the quantity of shipped documents dramatically illustrates the massive spike in document destruction that coincided with notification of the SEC inquiry. J.A. 133. In addition to destroying paper documents, the Enron engagement team deleted tens of thousands of e-mails and other electronic documents—at least three times as many as normal. J.A. 133; Tr. 1897, 3239, 3896, 3951-3955, 3990, 4171-4175, 5035-5036, 5766-5767.

During the period from October 19 to November 9, it became increasingly clear that the SEC would issue a subpoena to petitioner. In considering the possibility of calling in petitioner's in-house forensic accountants to assist the Enron engagement team, Temple noted that doing so was "not unusual" and "[w]ill help with SEC and jury." On October 26, petitioner's second-ranking partner, in a covering e-mail to a *New York Times* article on the SEC investigation, stated: "[T]he problems are just beginning and we will be in the cross hairs. The marketplace is going to keep the pressure on this and is going to force the SEC to be tough." On October 30, the SEC opened a formal investigation and sent a follow-up letter to Enron, signed by two top SEC officials, expressing "serious concerns about recent revelations regarding limited partnership transactions at Enron" and requesting certain public disclosures. Petitioner became

aware of the formal investigation by the following day. Meanwhile, petitioner discovered two more major accounting problems—one involving suspected fraud by Enron relating to another special-purpose entity named "Chewco," and the other involving a large accounting error by petitioner itself. Numerous civil lawsuits were filed against Enron, and petitioner received a subpoena for Enron-related documents in connection with one of those suits. J.A. 121-124; Pet. C.A. Reply Br. 28 n.10; GXs 928B, 1026A; Tr. 505-507, 1179-1183, 1372, 1931-1938, 1944-1956, 3654, 4591, 4605-4608, 4683-4684, 5157-5158, 5602-5609.

Notwithstanding all of those developments, petitioner continued to shred Enron-related documents. And it did so even though both Duncan and Temple were warned of the dangers of destroying those documents. On October 26, Andersen partner John Riley heard the sound of a shredder and confronted Duncan, warning him that "this wouldn't be the best time in the world for you guys to be shredding a bunch of stuff." Duncan agreed that the "worst-case scenario" in a "situation like this" would be "people * * * destroying a lot of documents," but took no action. On October 31, Andersen partner David Stulb saw Duncan looking at a document that used the phrase "smoking gun" in reference to Watkins's initial warnings about Enron's accounting scandals. After reading the "smoking gun" reference aloud and stating, "[w]e don't need this," Duncan started to destroy the document. Stulb warned Duncan of the need to retain "all of this information" because of the "strong likelihood" that the SEC, among others, would be interested. Stulb later informed Temple that Duncan needed guidance on document retention. Temple promised to take care of the matter, but did nothing. J.A. 170-171, 175-177; Tr. 5900-5901.

On November 8 (the deadline for responding to the SEC's October 30 letter), Enron announced that it would issue a comprehensive restatement of its earnings and assets. That same day, the SEC served petitioner and Enron with sub-

poenas. On November 9, Duncan's secretary sent an e-mail to the Enron engagement team entitled "No More Shredding," which stated: "Per Dave—No more shredding. * * * We have been officially served for our documents." On December 2, Enron filed for bankruptcy. In January 2002, petitioner announced that it would fire Duncan and suspend other partners on the Enron engagement team. Pet. App. 6a-7a; Tr. 4590, 5691, 5720-5725, 5928-5932; GXs 1108A, 1108C, 1109A.

2. On March 7, 2002, petitioner was indicted in the United States District Court for the Southern District of Texas on one count of corruptly persuading persons with the intent to cause them to withhold documents from, or alter documents for, an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B). J.A. 134-140.[5] Duncan subsequently pleaded guilty to one count of the same offense. Tr. 1666.

At the close of trial, the government requested a jury instruction defining the statutory term "corruptly" as "having an improper purpose," and further specifying that, "[i]n order to establish that [petitioner] acted corruptly, it is not necessary for the government to prove that [petitioner] knew its conduct violated the criminal law." R. 284. The government also sought to define an "official proceeding" as "a proceeding before a federal court, judge, or agency," and to specify that "[a]n official proceeding includes all of the steps and stages in the agency's performance by an agency of its governmental functions * * * both formal and informal." R. 279-280.

[5] Petitioner does not dispute, and well-established law provides, that a partnership may be held criminally liable for the acts of an agent or employee acting within the scope of his agency or employment, provided that the agent or employee was acting at least in part with the intent to benefit the partnership. See, *e.g.*, *United States* v. *A&P Trucking Co.*, 358 U.S. 121, 126-127 (1958).

Petitioner requested an instruction stating that "[a] person persuades another person 'corruptly' only if he or she (1) uses an improper method, such as bribery or other unlawful means, to induce that person to act; or (2) persuades the other person to do something that they would not have had a lawful right to do had they been acting on their own." R. 146. Petitioner also requested an instruction stating that "[a]n otherwise innocent act of persuasion is not 'corrupt' if it is undertaken with a genuine belief that the persuasion is not improper or unlawful, even if its purpose is to make information unavailable to an official proceeding." R. 145. In addition, petitioner asked the court to specify that "the 'official proceeding' must be one that is ongoing or has been scheduled to be commenced in the future," R. 148, and that "an informal inquiry conducted by SEC staff * * * is not an 'official proceeding,'" R. 147.

The district court rejected petitioner's proposed instructions. Pet. App. 36a-45a. The court noted that the term "corruptly" was also used in the general obstruction-of-justice statute, 18 U.S.C. 1503, and had been defined in that statute to mean "with an improper purpose." Pet. App. 37a. The court concluded that "the same meaning must be applied to 'corruptly' in § 1512." *Id.* at 38a. The court observed that case law from other circuits supported the "improper purpose interpretation of § 1512." *Ibid.* The court also concluded that "specific knowledge of the law is not required under § 1512(b)." *Id.* at 42a. Finally, the court reasoned that "a 'proceeding' is not restricted to formal adjudicative process," *id.* at 43a, and rejected petitioner's contention that an "official proceeding" must be ongoing or scheduled at the time of the document destruction, *id.* at 44a.

The court subsequently instructed the jury that "[t]he word 'corruptly' means having an improper purpose." J.A. 212. Borrowing from (and slightly modifying) the Fifth Circuit's model jury instructions for Section 1503, the court then elaborated on that definition, stating that "[a]n improper

purpose for this case is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." *Ibid.* The court also informed the jury that "it is not necessary for the Government to prove that [petitioner] knew that its conduct violated the criminal law." J.A. 213. The court defined an "official proceeding" as "a proceeding before a federal court, judge, or agency" and specified that "[a] proceeding * * * includes all of the steps and stages in the agency's performance of its governmental functions * * * both formal and informal." J.A. 211. The court added that "it is not necessary for the Government to prove that an official proceeding was pending or even about to be initiated at the time the obstructive conduct occurred." J.A. 213. The jury found petitioner guilty.

3. The court of appeals affirmed. Pet. App. 1a-34a.

a. The court of appeals held that the jury instructions correctly defined the statutory term "corruptly." Pet. App. 17a-25a, 28a-29a. The court of appeals noted that courts interpreting the term "corruptly" in other obstruction-of-justice statutes had defined it to require an improper purpose, and that a majority of circuits interpreting the term "corruptly" in Section 1512(b) had defined it in similar terms. *Id.* at 19a. The court of appeals also reasoned that the district court correctly rejected petitioner's proposed instructions on the definition of "corruptly." *Id.* at 23a-25a, 28a-29a. In upholding the rejection of petitioner's proposed instruction that "the only way corrupt persuasion may be found is by an improper method or a violation of an independent legal duty," the court of appeals noted that no other court had endorsed that approach. *Id.* at 23a. The court of appeals added that "[petitioner] * * * gives no explanation why 'improper purpose' should require unlawful conduct" or "improper means." *Id.* at 24a. Instead, the court observed, "the means used would seem to be relevant only to the extent that they shed light on whether the purpose was improper." *Ibid.* The court reasoned that "[t]he statute would

have little independent reach * * * if it could be violated only through bribery or suborning perjury because such conduct is to a large extent criminalized in other provisions of the criminal code." *Ibid.* The court likewise rejected petitioner's contention that the jury should have been instructed that "corruptly" requires knowledge of wrongdoing, noting that "[t]he general rule * * * is that ignorance of the law is no defense." *Id.* at 29a. The court reasoned that, "[w]hen Congress wishes to avoid the general rule, it usually does so by requiring that a defendant act willfully or with specific intent to violate the law." *Ibid.*

b. The court of appeals also held that the jury instructions correctly defined the phrase "official proceeding." Pet. App. 25a-28a. Like the district court, the court of appeals rejected petitioner's contention that an "official proceeding" must be ongoing or scheduled at the time the document destruction occurred. *Id.* at 26a. The court reasoned that such a reading "defie[d]" the statutory provision that specifies that an official proceeding need not be pending or about to be instituted at the time of the offense. *Ibid.* (citing 18 U.S.C. 1512(e)(1) (2000)). The court also rejected petitioner's related contention that a defendant must "ha[ve] in mind a particular proceeding that it sought to obstruct" at the time the document destruction occurred. *Id.* at 26a-27a. The court again observed that this requirement "ignores the statutory language, which does not require a defendant to know that the proceeding is pending or about to be initiated." *Id.* at 27a. To the extent that the failure to impose such a requirement could criminalize the conduct of innocent defendants, the court reasoned that "[t]hat case is not before us," but added that "[t]he answer * * * may lie with the sound application of the elements of corrupt purpose and intent." *Ibid.*

SUMMARY OF ARGUMENT

Petitioner was validly convicted of corruptly persuading its employees with the intent to cause them to withhold documents from, or alter documents for, an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B). Petitioner portrays its document-destruction campaign, in the face of a looming SEC investigation, as wholly legitimate conduct (Br. 20-24)—as if American corporations routinely find it proper to instruct their employees to lay waste to vast troves of documents when a government investigation is viewed as highly probable. Nothing could be farther from the truth. Petitioner was not charged with having a document destruction policy as such. As the court of appeals recognized, "[t]here is nothing improper about following a document retention policy when there is no threat of an official investigation." Pet. App. 25a. But when, after realizing that a government investigation is bearing down on it, a company seizes on a dormant or widely ignored document policy and uses it as a pretext to destroy evidence of its own or its client's potential misconduct, it is altogether another matter. No responsible entity would engage in such conduct; petitioner's own document policy prohibited it. Petitioner's elaborate claims notwithstanding, its conduct represents a serious departure from well-established principles in the criminal law, and its conviction under Section 1512(b) should be affirmed.

I. The lower courts correctly defined the term "corruptly" in Section 1512(b) as "having an improper purpose" "to subvert, undermine, or impede the fact-finding ability of an official proceeding." The lower courts' definition is consistent with the purpose-based definition long given to the identical term in the general obstruction-of-justice statute, 18 U.S.C. 1503, on which Section 1512 was based; in other obstruction-of-justice statutes; and in other federal criminal statutes more generally. That definition does not render the

term "corruptly" superfluous. Nor does it criminalize conduct that is not inherently wrongful, because it has long been understood that it is improper to destroy documents when litigation is anticipated for the purpose of frustrating the truthseeking process.

Petitioner's novel alternative definitions of the term "corruptly"—which would require either "proof of improper means of persuasion or inducement to unlawful acts," or "proof of consciousness of wrongdoing"—should be rejected. The former definition cannot be reconciled with the text of the statute; would give the term "corruptly" a different meaning in Section 1512(b) than in other obstruction-of-justice statutes; and would criminalize little, if any, conduct that is not already criminalized by other provisions. The latter definition contravenes the established principle that ignorance of the law is no defense, and no exception to that principle is warranted here.

Neither the rule of lenity, the doctrine of constitutional doubt, nor constitutional principles of fair warning justify petitioner's alternative definitions of "corruptly." The rule of lenity and the doctrine of constitutional doubt are both inapplicable here, because the term "corruptly" is not ambiguous. Petitioner identifies no serious constitutional concerns arising from the lower courts' construction of the statute, and petitioner had fair warning that its conduct was unlawful.

II. The district court correctly instructed the jury on the definition of the phrase "official proceeding." Petitioner first contends that the district court should have instructed the jury that the government was required to prove that petitioner believed that an official proceeding was likely to occur in the near future. Petitioner did not request such an instruction, and the failure to give it was not plainly erroneous. Although petitioner did request an instruction that the government was required to show that petitioner intended to obstruct some *particular* proceeding, the statute cannot

be interpreted to require such a showing when no proceeding had yet been instituted, and petitioner was not prejudiced by the failure to provide any such instruction because the evidence left no doubt that the SEC's Enron investigation was the "proceeding" at issue.

Finally, petitioner contends that the district court erroneously instructed the jury that an informal SEC proceeding could constitute an "official proceeding." Petitioner waived that claim by failing to preserve it in the court of appeals. Even assuming that petitioner properly preserved that argument, petitioner's contention lacks merit. The statute authorizing the SEC to conduct investigations treats all investigations as proceedings, and courts have consistently considered agency investigations, even preliminary ones, to be "proceedings" for purposes of a companion statute, 18 U.S.C. 1505. And because an intent to obstruct an *informal* investigation necessarily implies an ultimate intent to obstruct a *formal* investigation, any instructional error by the district court was harmless.

ARGUMENT

PETITIONER WAS PROPERLY CONVICTED OF CORRUPTLY PERSUADING ITS EMPLOYEES WITH THE INTENT TO CAUSE THEM TO WITHHOLD DOCUMENTS FROM, OR ALTER DOCUMENTS FOR, AN OFFICIAL PROCEEDING, IN VIOLATION OF 18 U.S.C. 1512(b)(2)(A) AND (B)

I. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY ON THE DEFINITION OF THE TERM "CORRUPTLY"

In 1988, Congress amended Section 1512(b) to impose criminal sanctions on any person who "corruptly persuades" another person not to testify in, or to withhold evidence from or alter evidence for, a pending or future official proceeding. The jury was instructed that the term "corruptly" requires a defendant to act with "an improper purpose," is, "an intent

to subvert, undermine, or impede the fact-finding ability of an official proceeding." That definition is consistent with the purpose-based definition that federal criminal law has long assigned to the term "corruptly." Petitioner instead seeks (Br. 20-42) to impose on the term "corruptly" a novel requirement of proof either that the defendant "corrupt" the person persuaded (either by using an improper means or by inducing unlawful acts), or, alternatively, that the defendant believed its conduct was "wrongful." The courts below correctly rejected that unprecedented requirement and instead adhered to the traditional, purpose-based definition of the term.

A. The Lower Courts Correctly Defined The Term "Corruptly" As "Having An Improper Purpose" "To Subvert, Undermine, Or Impede The Fact-Finding Ability Of An Official Proceeding"

1. The term "corruptly" is similarly defined in other obstruction-of-justice statutes

The lower courts' definition of the term "corruptly" in Section 1512(b) was drawn from, and is wholly consistent with, the settled definition of that term in other obstruction-of-justice statutes.

a. In 1831, Congress enacted the general obstruction-of-justice statute that is now codified at 18 U.S.C. 1503. See Act of Mar. 2, 1831, ch. 99, § 2, 4 Stat. 487. The so-called "omnibus" clause of that statute, which has remained largely unchanged, imposes criminal sanctions on any person who "corruptly * * * influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." Lower courts construing that clause have consistently held that the term "corruptly" supplies a state-of-mind requirement. Although they have not used identical formulations in articulating that requirement, they have uniformly held that the term "corruptly" requires a defendant to act with an improper purpose: namely, an

intent to obstruct justice. See, *e.g.*, *United States* v. *Machi*, 811 F.2d 991, 996 (7th Cir. 1987) (upholding instruction that "corruptly means to act with the purpose of obstructing justice"); *United States* v. *Jeter*, 775 F.2d 670, 679 (6th Cir. 1985) (holding that, in order to violate the statute, "one must impede the due administration of justice with the general intent of knowledge *as well as the specific intent of purpose to obstruct*"), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981) (holding that "the word 'corruptly' as used in the statute means that the act must be done with the purpose of obstructing justice"), cert. denied, 454 U.S. 1157 (1982); *United States* v. *Ogle*, 613 F.2d 233, 238-239 (10th Cir. 1979) (approving instruction defining "corruptly" as "an endeavor to influence a juror in the performance of his or her duty, or to influence, obstruct or impede the due administration of justice"), cert. denied, 449 U.S. 825 (1980).[6] Drawing on those cases, model jury instructions for Section 1503 define the term "corruptly" similarly. See, *e.g.*, 2A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions: Criminal* § 48.04, at 456 (5th ed. 2000) (defining "corruptly" as "voluntarily and deliberately and for the purpose of improperly influencing, or obstructing, or interfering with the administration of justice"); 2 Leonard B. Sand et al., *Modern Federal Jury Instructions: Criminal* ¶ 46.01, at 46-6 (2004) (defining "corruptly" as "simply having the improper motive or purpose of obstructing justice").[7]

---

[6] Some courts have held, in prosecutions under Section 1503, that an intent to obstruct justice can be inferred if the natural and probable consequence of a defendant's actions will be to obstruct a judicial proceeding. See, *e.g.*, *United States* v. *Schwarz*, 283 F.3d 76, 109 (2d Cir. 2002); *United States* v. *Fleming*, 215 F.3d 930, 938 (9th Cir. 2000); *United States* v. *Brooks*, 111 F.3d 365, 372 (4th Cir. 1997).

[7] Petitioner suggests (Br. 22) that "courts have not 'uniformly' instructed juries in § 1503 cases that 'corrupt' means an 'improper purpose to impede fact finding.'" The authorities it cites in support, however, stand only for the (unsurprising) proposition that courts have used slightly different formulations in elaborating on the "improper purpose" that is required. Petitioner relies on the jury instruction given by the district court in *United States* v. *Aguilar*, 515 U.S. 593 (1995), and quoted by Justice Scalia in his separate opinion. See *id.* at 616-617 (opinion concurring in part and dissenting in part). The Court, however, did not pass on the validity of that instruction, which used a formulation of the definition of "corruptly" (apparently taken from a since-superseded model jury instruction, see *Ninth Circuit Manual of Model Jury Instructions* (*Criminal*) § 8.108 (2003)) that is consistent—unlike petitioner's approach—with the purpose-based approach used in this case, see pp. 24-26, *infra*. Petitioner also relies on the D.C. Circuit's statement that "[c]ourts construing § 1503 have adopted a wide variety of interpretations." *United States* v. *Poindexter*, 951 F.2d 369, 385 (1991), cert. denied, 506 U.S. 1021 (1992). The case cited by the D.C. Circuit for that proposition, however, cites only a single (Section 1505) case that also used a purpose-based definition of "corruptly." See *United States* v. *North*, 910 F.2d 843, 941 n.14 (D.C. Cir.) (Silberman, J., concurring in part and dissenting in part) (citing *United States* v. *Mitchell*, 877 F.2d 294 (4th Cir. 1989)), modified on reh'g, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991).

b. The history of Section 1512 demonstrates that the term "corruptly" in that section should be defined, as in Section 1503, to require an intent to obstruct justice. In addition to its "omnibus" clause, Section 1503 previously contained a separate witness-tampering clause, imposing criminal penalties on any person who "corruptly [or coercively] endeavors to influence, intimidate, or impede any witness" in a federal judicial proceeding. In 1982, Congress deleted that clause and recodified it in new Section 1512, but without the current "corruptly persuades" element. See Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 4(a), 96 Stat. 1248. Thus, as originally enacted in 1982, Section 1512 covered only coercive (or deceptive) conduct. It did not prohibit non-coercive, non-deceptive witness tampering—conduct that was previously covered under Section 1503's witness-tampering clause. See, *e.g.*, *United States* v. *Jackson*, 607 F.2d 1219, 1223 (8th Cir. 1979), cert. denied, 444 U.S. 1080 (1980); *United States* v. *Howard*, 569 F.2d 1331, 1334 (5th Cir.), cert. denied, 439 U.S. 834

(1978). Congress's omission gave rise to a circuit split: although most courts to address the issue held that non-coercive, non-deceptive witness tampering could continue to be prosecuted under the "omnibus" clause of Section 1503, see *United States* v. *Tackett*, 113 F.3d 603, 607 (6th Cir. 1997) (listing cases), cert. denied, 522 U.S. 1089 (1998), the Second Circuit concluded that Congress intended Section 1512 to serve as the exclusive means for prosecuting witness tampering of any kind, see *United States* v. *Hernandez*, 730 F.2d 895, 898-899 (2d Cir. 1984).

In response, Congress amended Section 1512 in 1988 to add "corruptly persuades" to the list of prohibited conduct. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(a) and (c), 102 Stat. 4397, 4398. Where, as here, Congress uses a term that is also found in a closely related statute, and where the term had long been given a consistent meaning in that statute, Congress is presumed to have intended to give the term the same meaning in the new statute, absent affirmative indication to the contrary. See, *e.g.*, *Salinas* v. *United States*, 522 U.S. 52, 63 (1997); *Morrissette* v. *United States*, 342 U.S. 246, 263 (1952); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 59 (1911). The legislative history confirms the applicability of that presumption: a section-by-section analysis of the legislation clarifies that Congress added the "corruptly persuades" language to Section 1512 "merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503." 134 Cong. Rec. 32,701 (1988) (statement of Sen. Biden). Because the term "corruptly" in Section 1503 had long been defined to require an intent to obstruct justice, "[i]t is reasonable to attribute to the 'corruptly persuade' language in Section 1512(b), the same well-established meaning." *United States* v. *Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998), cert. denied, 525 U.S. 1177 (1999).

c. The term "corruptly" appears in several other provisions in the obstruction-of-justice chapter of Title 18 of the United States Code. See 18 U.S.C. 1505; 18 U.S.C. 1512(c) (Supp. II 2002); 18 U.S.C. 1517. Most notably, Section 1505, enacted in 1940, imposes criminal sanctions on any person who "corruptly * * * influences, obstructs, or impedes or endeavors to influence, obstruct or impede" (1) "the due and proper administration of law" in administrative proceedings, or (2) "the due and proper exercise of the power of inquiry" in congressional proceedings. At the time Congress enacted (and modified) Section 1512, courts had construed "corruptly" in Section 1505 to have the same meaning as "corruptly" in the statute on which it was modeled, Section 1503. See, *e.g.*, *United States* v. *Laurins*, 857 F.2d 529, 536-537 (9th Cir. 1988) ("The specific intent required for obstruction of justice under sections 1503 and 1505 is that the defendant must have acted 'corruptly,' *i.e.*, that the act must be done with the purpose of obstructing justice."), cert. denied, 492 U.S. 906 (1989); *United States* v. *Abrams*, 427 F.2d 86, 90 (2d Cir.) (upholding instruction that "corruptly" means "with improper motive, a bad and evil purpose"), cert. denied, 400 U.S. 832 (1970). When the D.C. Circuit later held that the term "corruptly" rendered Section 1505 unconstitutionally vague on an as-applied basis, *United States* v. *Poindexter*, 951 F.2d 369, 379, 385 (1991), cert. denied, 506 U.S. 1021 (1992), Congress amended the statute to define "corruptly" as "acting with an improper purpose, personally or by influencing another," 18 U.S.C. 1515(b).[8] Just as Congress is presumed to have intended to give the term "corruptly" the same meaning in Section 1512(b) as it had in Section 1503, so

[8] It is insignificant that Congress defined "corruptly" only for purposes of Section 1505, and not for purposes of other provisions (such as Section 1503 or Section 1512(b)) that use the same term. See 141 Cong. Rec. 14,956 (1995) (statement of Sen. Levin) (noting that "[t]he definition applies only to section 1505 because the Poindexter decision interprets only that section"). Congress enacted the definitional provision in Section 1515(b) for the limited purpose of overruling *Poindexter*'s "nonsensical" interpretation. See 142 Cong. Rec. 25,468 (1996) (statement of Sen. Bryan).

too is Congress presumed to have intended to give the term the same meaning as it had in Section 1505.

2. Petitioner's criticisms of the lower courts' definition are unfounded

Petitioner offers four primary criticisms of the lower courts' definition of "corruptly." Those criticisms lack merit.

a. Petitioner contends (Br. 30) that it would be "positively nonsensical" to construe the term "corruptly" in Section 1512(b) to make it illegal in some circumstances to persuade another person to destroy documents when it would not be illegal for that person to destroy the documents himself. To the extent that there was any inconsistency in the statutory treatment of obstructive conduct, however, it was deliberately created by Congress. Sections 1503 and 1505, which prohibit obstructive actions such as the destruction of documents, have long been construed to require (1) an ongoing proceeding at the time of the obstructive action, and (2) knowledge of that ongoing proceeding by the obstructing party. See *Pettibone* v. *United States*, 148 U.S. 197, 207 (1893). But when Congress initially enacted Section 1512, it made clear that an individual could be criminally liable for coercing or deceiving another individual into destroying documents (and, later, for corruptly persuading another individual to destroy documents) even if no official proceeding was pending or about to be instituted. See 18 U.S.C. 1512(e)(1) (now codified at 18 U.S.C. 1512(f)(1) (Supp. II 2002)). Contrary to petitioner's suggestion (Br. 31), therefore, Congress expressly chose not to apply the "*Pettibone* rule" to cases involving witness tampering, even though it applies under Sections 1503 and 1505 to an individual's own conduct.[9]

[9] The legislative history confirms that this provision was included to "obviate[] the requirement that there be an official proceeding in progress or pending" and thereby "increase[] the scope of this section by expanding the galaxy of witnesses and victims the protections of its language is *[sic]* meant to embrace." S. Rep. No. 532, 97th Cong., 2d Sess. 19 (1982).

To the extent that any gap in statutory coverage existed, Congress has since eliminated it. As part of the Corporate and Criminal Fraud Accountability Act of 2002 (Sarbanes-Oxley Act), Pub. L. No. 107-204, 116 Stat. 800, Congress enacted new Section 1512(c), which prohibits individuals from "corruptly" engaging in obstructive actions (such as the destruction of documents) even if no official proceeding is pending or about to be instituted. See 18 U.S.C. 1512(c) (Supp. II 2002). Congress also enacted other provisions pertaining specifically to document retention and destruction. See 18 U.S.C. 1519 (Supp. II 2002) (prohibiting individuals from knowingly destroying or altering documents "with the intent to impede, obstruct, or influence" any official proceeding or "in relation to or contemplation of" any such proceeding); 18 U.S.C. 1520 (Supp. II 2002) (imposing criminal sanctions on accountants for failing to maintain "all audit or review workpapers" for five years and requiring the SEC to promulgate further requirements for the "retention of relevant records").

Petitioner asserts (Br. 30) that it would be erroneous to take those provisions into account because doing so would "commit[] the classic error of relying on subsequent legislative history to interpret the product of an earlier Congress." But the government's interpretation does not do so. Rather, it is *petitioner* that relies on the legislative history of the Sarbanes-Oxley Act in contending that Congress "recognized" that Section 1512(b) did not cover its conduct. See Pet. Br. 19 & n.22 (citing S. Rep. No. 146, 107th Cong., 2d Sess. 7 (2002)). The cited legislative history, however, does not indicate that members of a later Congress believed that petitioner's conduct was not covered by Section 1512(b): at most, it suggests that they believed only that, to the extent that there was any anomaly in the respective scope of

Sections 1505 and 1512, it was Section 1505 that was too narrow, not Section 1512 that was too broad. See S. Rep. No. 146, *supra*, at 7 (noting that it was unclear whether criminal liability would attach "in a [similar] case with a single person doing the shredding"). A later Congress's concerns about the underinclusiveness of the criminal law as to single-actor obstructive conduct do not shed any light on the reach of the earlier-enacted "corruptly persuades" prohibition.

b. Petitioner next claims (Br. 27-28) that the lower courts' definition of "corruptly" renders that term superfluous in view of the statutory requirement that a defendant have acted with the "intent" to cause another person to "withhold" documents from, or "alter" documents "to impair [their] availability for use in," an official proceeding. See 18 U.S.C. 1512(b)(2)(A) and (B). Petitioner errs in suggesting (Br. 28) that "[t]here is simply no space" between the intent to "deprive" an agency of documents and the intent to "subvert, undermine, or impede" the agency's fact-finding. An individual could act intentionally to have documents withheld from an official proceeding out of any number of motives besides a desire to obstruct the proceeding: for example, a person could persuade another person to delete e-mails to prevent them from being disclosed simply because they contained embarrassing material. As the Fifth Circuit noted, the former intent "implies a degree of personal culpability beyond a mere intent to make documents unavailable." Pet. App. 22a.

c. Nor is the lower courts' definition of the term "corruptly" irreconcilable with definitions of that term in other statutory contexts, as petitioner contends (Br. 22-23, 25-26). Each of the precise formulations of the definition of "corruptly" on which petitioner relies adopts a purpose-based approach that focuses on the defendant's improper motive. Petitioner first notes (Br. 26 & nn.28-29) that some courts—mainly in the bribery context—have defined "corruptly" as "with the intent to give some advantage inconsistent with official duty and the rights of others." *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V.* v. *Schreiber*, 327 F.3d 173, 181-183 (2d Cir. 2003) (construing "corruptly" in 15 U.S.C. 78dd-2); *United States* v. *Rooney*, 37 F.3d 847, 852-853 (2d Cir. 1994) (construing "corruptly" in 18 U.S.C. 666(a)); *United States* v. *Reeves*, 752 F.2d 995, 1000 (5th Cir.) (construing "corruptly" in 26 U.S.C. 7212(a)), cert. denied, 474 U.S. 834 (1985); see also *United States* v. *Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part) (quoting definition of "corruptly"). Unlike petitioner's proposed definition, however, that formulation turns entirely on the defendant's intent. And that formulation is readily reconcilable with the lower courts' definition, because an individual who acts with an intent to obstruct an official proceeding necessarily seeks some advantage inconsistent with official duty and the rights of others. See, *e.g.*, *Reeves*, 752 F.2d at 1002.

Petitioner also notes (Br. 26 n.28) that some courts have defined "corruptly" as "with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." *E.g.*, *United States* v. *Strand*, 574 F.2d 993, 996 (9th Cir. 1978). That formulation is primarily used in cases arising under federal bribery statutes, such as 18 U.S.C. 201.[10] Once again, that formulation critically differs from petitioner's definition, be-

[10] That formulation also appears, without elaboration, in the legislative history of two statutes, 18 U.S.C. 1032 and 18 U.S.C. 1517, enacted *after* Congress added the "corruptly persuades" prohibition to Section 1512(b). See H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1, at 173 n.3, 174 n.5 (1990). That legislative history quotes from a model jury instruction defining "corruptly" for purposes of the *bribery* statute, which adds that "a person acts 'corruptly' whenever he makes a willful attempt to persuade or influence the official action of a public official, by an offer of money or anything of value." 2 Edward J. Devitt & Charles B. Blackmar, *Federal Jury Practice and Instructions* § 34.08, at 110 (3d ed. 1977).

cause petitioner did not argue in the district court, and does not argue in this Court, that "corruptly" should be defined to require proof of an *intent* to use improper means or accomplish an unlawful act, but instead only that it should be defined to require proof of an improper means or an unlawful act *simpliciter*. See, *e.g.*, Br. 28 (contending that "interpreting 'corruptly' as just another 'purpose' requirement makes little sense"). In any event, that formulation is also consistent with the purpose-based approach given here. The term "unlawful" in that formulation does not mean "otherwise illegal": clearly, a defendant need not violate some other law, or intend for some other law to be violated, in order to bribe a government official. Instead, "unlawful" simply means "in violation of official duty." *United States* v. *Bonito*, 57 F.3d 167, 171 (2d Cir. 1995), cert. denied, 516 U.S. 1049 (1996). As so construed, that formulation is substantially similar to the definition used below, and to the other formulation on which petitioner relies.

d. Petitioner contends (Br. 21-22, 23-24) that the lower courts' definition of "corruptly" would criminalize "a wide variety of common conduct" that is not inherently wrongful. As an initial matter, petitioner cannot seriously contend that its *own* conduct—namely, the destruction of thousands of documents at a time when it believed that an SEC investigation was either likely or ongoing—falls into that category. Indeed, petitioner itself conceded before Congress that David Duncan's conduct was "simply unacceptable," noting that there was "every appearance of destroying these materials in anticipation of a government request for documents." GX 2002K.

Petitioner thus more broadly suggests (Br. 21-22) that the lower courts' definition of "corruptly" would criminalize some behavior that is sanctioned by so-called document "retention" policies adopted by many corporate entities, including petitioner. Even before the enactment of the recent Sarbanes-Oxley Act, however, many of those policies, including petitioner's, contained provisions expressly prohibiting the destruction of documents when litigation or investigations were deemed to be likely. See, *e.g.*, J.A. 29-30, 44, 65. Moreover, to the extent that document policies did not themselves contain express restrictions, it was the prevailing view at the time of petitioner's conduct that document destruction was improper, even if otherwise permitted by a document policy, under such circumstances.[11]

In a similar vein, petitioner suggests (Br. 23-24) that, even if conduct undertaken with an intent to impede *judicial* proceedings is inherently wrongful, conduct undertaken with an intent to impede congressional or agency proceedings is not. By its terms, however, Section 1512(b) draws no distinction between judicial proceedings and congressional or agency proceedings, but instead prohibits obstructive conduct directed toward all types of "official proceedings." The D.C. Circuit opinions on which petitioner relies involved not Section 1512(b) but Section 1505, which more broadly prohibits *any* endeavor to impede, obstruct, or so much as "influence" a congressional or agency proceeding (and is not constrained by any other intent requirement). See *United States* v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), cert.

---

[11] See, *e.g.*, W. Russell Welsh & Andrew C. Marquardt, *Spoliation of Evidence*, 23 WTR Brief 9, 36-37 (1994) ("[A] corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy."); Bruce G. Vanyo & Terry T. Johnson, *The Pretrial Phase: A Practical Guide for the Non-Litigator*, 584 PLI/Corp 247, 286 (1987) ("Obviously, a document retention policy cannot serve as a vehicle for destroying documents that a party anticipates would be relevant in prospective litigation."); cf. *Lewy* v. *Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988) (noting that company's destruction of documents pursuant to document policy could still give rise to adverse inference if party "knew or should have known that [the documents] would become material at some point in the future"); Michael R. Overly & Chanley T. Howell, *Document Retention in the Electronic Workplace* 48 (2001) (citing *Lewy* for proposition that "[a] record retention and destruction policy alone will not necessarily shield a corporation from sanctions").

denied, 506 U.S. 1021 (1992); *United States* v. *North*, 910 F.2d 843 (D.C. Cir.), modified on reh'g, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991). And to the extent that those opinions drew a distinction concerning the comparative wrongfulness of obstruction of judicial proceedings and of congressional or agency proceedings, Congress effectively overrode that judgment by amending the obstruction-of-justice statutes to clarify that Section 1505 has the same scope as Section 1503. See pp. 20-22, *supra*.

Finally, petitioner lists a number of hypothetical cases (Br. 24) in which, it contends, the lower courts' definition of "corruptly" would criminalize seemingly innocent conduct. All of those hypotheticals, however, are distinguishable. In some of those hypotheticals (*e.g.*, when a person advises a family member to assert his Fifth Amendment privilege), the would-be defendant does not act with the requisite "intent to subvert, undermine, or impede the fact-finding ability of an official proceeding" at all, but instead acts with a different intent (*e.g.*, an intent to protect another person from self-incrimination). In other hypotheticals (*e.g.*, when a person instructs another person in good faith to assert a legal privilege in response to a subpoena), liability would not attach under Section 1512(b) even if the defendant acted with the requisite intent, because he did not "withhold" any information to which the requesting party was legally entitled. In still other hypotheticals (*e.g.*, when a person advises another person not to provide documents in response to a voluntary request), even if the defendant could be said to be "withholding" information at all, he *may* be able to argue that the government cannot prove that his action had the "natural and probable effect" of obstructing an official proceeding, since any withheld information could subsequently be sought by subpoena. See *Aguilar*, 515 U.S. at 599-600 (applying "nexus" requirement under Section 1503); see generally p. 44 n.24, *infra* (discussing whether the *Aguilar* "nexus" requirement applies under Section 1512(b)).

Finally, in the remainder of petitioner's hypotheticals (*e.g.*, when a lawyer advises his client in good faith not to volunteer information), the defendant could assert immunity from liability under Section 1515(c), which expressly provides that "[t]his chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or *anticipation of* an official proceeding." 18 U.S.C. 1515(c) (emphasis added).[12] Because the lower courts' definition of "corruptly" does not criminalize conduct that is not inherently wrongful, and because that definition is consistent with the text and history of Section 1512(b), petitioner's challenges to that definition lack merit.

B. Petitioner's Novel Definition Of The Term "Corruptly" Should Be Rejected

Instead of the lower courts' definition, petitioner proposes (Br. 25-37) that the term "corruptly" in Section 1512(b) be defined to require "proof of improper means of persuasion or inducement to unlawful acts" or, in the alternative, "consciousness of wrongdoing." No court has ever adopted either of those definitions of "corruptly" in construing any federal statute, and each of those definitions is deeply flawed.

1. The term "corruptly" does not require "proof of improper means of persuasion" or "inducement to unlawful acts"

---

[12] Petitioner contends (Br. 27) that Section 1515(c) "is a guide to interpretation, not an affirmative defense." As amicus National Association of Criminal Defense Lawyers correctly notes (Br. 20-21), however, lower courts have consistently concluded that Section 1515(c) provides an affirmative defense. See *United States* v. *Kloess*, 251 F.3d 941, 948 (11th Cir. 2001); *United States* v. *Kellington*, 217 F.3d 1084, 1098 (9th Cir. 2000); *United States* v. *Davis*, 183 F.3d 231, 248 (3d Cir.), amended on reh'g, 197 F.3d 662 (3d Cir. 1999). To the extent that petitioner's conviction rested on the conduct of an in-house lawyer, see pp. 1-10, *supra*, petitioner is not entitled to obtain any relief on that basis (contrary to petitioner's suggestion, see Br. 50 n.44), because it failed to seek a jury instruction concerning, or otherwise invoke, Section 1515(c) during the trial.

a. Petitioner first contends (Br. 25-34) that a person acts "corruptly" for purposes of Section 1512(b) if he uses an improper means or induces another person to commit an unlawful act. That requirement cannot be reconciled with the text of the statute. Petitioner asserts (Br. 25) that such a requirement is consistent with a "transitive reading" of the adverb "corruptly." Adverbs, however, do not have "transitive" meanings: that term, in its grammatical sense, refers not to adverbs, but to *verbs*. See, *e.g.*, 18 *Oxford English Dictionary* 407 (2d ed. 1989) (defining "transitive" as "[o]f verbs and their construction: [e]xpressing an action which passes over to an object; taking a direct object to complete the sense"). If Congress had intended to convey the meaning that petitioner suggests, it likely would have imposed criminal sanctions on a person who "*corrupts* another person by means of persuasion"—not on a person who merely "corruptly *persuades* another person." Petitioner all but invites the Court to rewrite the statute in that manner. See, *e.g.*, Br. 25 (suggesting that "corruptly persuades" means "corrupting" a witness); Br. 25 n.27 (relying on dictionary definitions of the verb "corrupt"); Br. 34 (stating that "Congress simply intended to protect witnesses from attempts to 'corrupt' them as well as from attempts to coerce or intimidate them").[13]

Petitioner's "improper means or unlawful act" definition suffers from two other major flaws. First, as petitioner appears to concede (Br. 21), its definition would require the term "corruptly" to be given one meaning in Section 1512(b) and another in Sections 1503 and 1505. Because there is typically no separate "act" that is induced by the defendant in cases arising under Sections 1503 and 1505, the "unlawful act" component of petitioner's definition would ordinarily be inapplicable. And courts have rejected the argument that Sections 1503 and 1505 reach only a defendant's use of an "improper means." See, *e.g.*, *United States* v. *Brady*, 168 F.3d 574, 578-579 (1st Cir. 1999) (Section 1503); *United States* v. *Mitchell*, 877 F.2d 294, 299 (4th Cir. 1989) (Section 1505); *Ogle*, 613 F.3d at 239 (Section 1503). Petitioner's definition would therefore contravene the well-established canon of construction that identical words in closely related statutes are intended to have the same meaning, especially where one statute is enacted against the backdrop of the others. See pp. 19-20, *supra*.

Second, under petitioner's definition, the "corruptly persuades" prong of Section 1512(b) would criminalize little, if any, conduct that is not already criminalized by other provisions. Petitioner appears to equate an "improper" means of persuasion with an *unlawful* means of persuasion. See, *e.g.*, Br. 25, 26, 28. To the extent that the means used is unlawful, however, the "improper means" component would by definition reach only conduct that could be prosecuted on other grounds. The only examples petitioner provides, bribing or blackmailing a witness and urging perjury, all fall into that category. See 18 U.S.C. 201(b)(3) (bribery of witnesses); 18 U.S.C. 873 (blackmail); 18 U.S.C. 1622 (subornation of perjury). And the same could be said with regard to the "unlawful act" component of petitioner's definition, because the federal aiding-and-abetting statute already imposes criminal sanctions on anyone who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States." 18 U.S.C. 2(b).[14]

---

[13] In a similar vein, petitioner contends (Br. 18) that "'corruptly persuades' appears in § 1512 in a list of unlawful *means*." That is incorrect. "Corruptly persuades" is one in a list of criminalized *actions*, and the action that is criminalized is "corruptly persuading," not "corrupting by means of persuasion."

[14] To the extent that the "unlawful act" component of petitioner's definition limits the scope of the "corruptly persuades" prohibition in Section 1512(b) mainly to cases in which the persuaded individual's conduct is itself unlawful under Section 1503 or Section 1505, that component is also in tension with Congress's explicit provision that an individual could be

b. Petitioner offers several defenses of its "improper means or unlawful act" definition, all of which are unavailing.

Petitioner suggests (Br. 27) that an "improper means or unlawful act" requirement is mandated by the canon of *ejusdem generis* (or, more appropriately, the canon of *noscitur a sociis*). Because every other action criminalized by Section 1512(b) ("uses intimidation," "threatens," and "engages in misleading conduct") involves wrongful conduct, the argument goes, "corruptly persuades" must be construed to involve wrongful conduct as well. At the outset, it is questionable whether all of those other actions are themselves inherently wrongful. See S. Rep. No. 532, 97th Cong., 2d Sess. 15 (1982) (noting that "innocent acts" can sometimes constitute intimidation). Even if they are, however, it does not follow that the term "corruptly" incorporates an "improper means or unlawful act" requirement. Persuading another person not to testify, or to withhold or alter documents, with "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," is itself "wrongful" conduct. See pp. 26-29, *supra*; cf. *Aguilar*, 515 U.S. at 617 (Scalia, J., concurring in part and dissenting in part) (noting that "[a]cts specifically intended to 'influence, obstruct, or impede, the due administration of justice' are obviously wrongful, just as they are necessarily 'corrupt'"). And to the extent that the "improper means" component of petitioner's definition reaches only conduct that is otherwise prohibited, petitioner's construction would affirmatively *violate* the canon of *noscitur a sociis*, because none of the other actions criminalized by the current version of Section 1512(b)—intimidating, threatening, or misleading another individual—is necessarily unlawful.

---

criminally liable under Section 1512 even if no official proceeding is pending (as is required for criminal liability to attach under Section 1503 or Section 1505). See 18 U.S.C. 1512(e)(1) (2000); see generally pp. 22-24, *supra* (discussing old Section 1512(e)(1)).

Petitioner similarly errs in arguing (Br. 28-29) that its definition of "corruptly" is supported by Section 1515(a)(6), which provides that "the term 'corruptly persuades' does not include conduct which would be misleading conduct but for a lack of state of mind." Although petitioner contends (Br. 29) that Section 1515(a)(6) "must provide a defense for some defendants whose persuasion would otherwise be corrupt," petitioner in the same breath concedes (Br. 28) that, under its definition of "corruptly," Section 1515(a)(6) would merely "clarif[y]" that certain conduct already excluded from the scope of Section 1515(b) would remain excluded. Specifically, Section 1515(a)(6) would never be triggered because the defendant would never "lack" the state of mind required under the definition of "misleading conduct" in Section 1515(a)(3). Although Section 1515(a)(6) would have only limited application under the lower courts' definition of "corruptly," petitioner's definition would read Section 1515(a)(6) out of the statute altogether.[15]

Petitioner's reliance (Br. 29) on 18 U.S.C. 1512(c) (2000) (now codified at 18 U.S.C. 1512(d) (Supp. II 2002)) is equally misplaced. That provision imposes criminal penalties on any person who "intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person" from, *inter alia*, testifying in an official proceeding. Petitioner contends (Br. 29) that it would be "surprising" if Congress imposed lesser penalties on a defendant for dissuading another person from testifying by means of intentional harassment under old Section 1512(c) (*viz.*, up to one year of imprisonment) than for "politely persuading" another person not to testify under Section 1512(b) (up to

---

[15] In addition, under petitioner's definition, Section 1515(c) would have little, if any, independent effect—as petitioner implicitly concedes (Br. 27). When a defendant uses an unlawful means, Section 1515(c) would never apply, since it provides a defense only in cases involving the provision of "*lawful*, bona fide, legal representation services." 18 U.S.C. 1515(c) (emphasis added).

ten years). Section 1512(b), however, differs critically from old Section 1512(c) because it requires not merely that the defendant act intentionally in the sense of volitionally and knowingly, but also that the defendant (1) act with the specific intent of causing or inducing another person to withhold testimony or withhold or alter documents, and (2) act "corruptly," *i.e.*, with the intent of subverting, undermining, or impeding the fact-finding ability of an official proceeding. The presence of that greater degree of mens rea amply justifies the imposition of greater sanctions.

Citing the legislative history, petitioner asserts (Br. 32-33) that the purpose of the original Section 1512 was to protect witnesses. See, *e.g.*, S. Rep. No. 532, *supra*, at 15. That assertion is true, but it is incomplete: as the language of the statute makes clear, the purpose of Section 1512 was not only to protect witnesses from being coerced or deceived into not testifying, but also to prevent persons from being coerced or deceived into withholding or altering documents or other evidence. In both cases, Congress's overriding concern was to "protect the integrity of the process." *Id.* at 19; cf. 128 Cong. Rec. 26,350 (1982) (statement of Rep. Rodino) (stating, in section-by-section analysis, that purpose of Section 1512 was not only to "protect[] witnesses," but also to "protect[] the integrity of Federal * * * proceedings").[16] And the legislative history of the "corruptly persuades" prohibition in Section 1512(b) specifically indicates that Congress intended to reach beyond cases in which the defendant used an improper means or induced an

[16] Petitioner notes (Br. 33) that the original version of what would become Section 1512 contained a broad obstruction-of-justice provision, which was deleted before the bill was passed. That deletion, however, was justified not merely on the ground that the provision was "beyond the legitimate scope of this witness protection measure," as petitioner contends, but also on the ground that the provision was "probably duplicative of [o]bstruction of justice statutes already in the books." 128 Cong. Rec. 26,810 (1982) (statement of Sen. Heinz).

unlawful act. See 134 Cong. Rec. 32,701 (1988) (statement of Sen. Biden) (defining the concept of "'[c]orrupt persuasion' of a witness" to include, without limitation, "a non-coercive attempt to induce a witness to become unavailable to testify").[17] Neither the legislative history of the original Section 1512, nor the legislative history of the "corruptly persuades" prong of Section 1512(b), thus supports petitioner's "transitive" definition of "corruptly."

2. The term "corruptly" does not require "consciousness of wrongdoing"

In the alternative, petitioner contends (Br. 34-37) that, if the term "corruptly" is given an "intransitive" meaning, the mens rea it describes should require "consciousness of wrongdoing." Petitioner offers no valid justification, however, for preferring its novel "consciousness of wrongdoing" requirement over the lower courts' more conventional intent requirement.

As an initial matter, petitioner errs by suggesting in its merits brief (Br. 34-35), for the first time in this litigation, that the term "knowingly" modifies the phrase "corruptly persuades."[18] Whether or not modified by "knowingly," however, the term "corruptly" cannot be read to require "consciousness of wrongdoing." To the extent that petitioner argues that "corruptly" requires knowledge of *unlawfulness*, petitioner cannot overcome the "venerable principle

[17] Petitioner argues (Br. 34 n.34) that Senator Biden's comments on the VWPA referred only to Section 1503 cases in which the "corrupt persuasion" involved "independently wrongful efforts to influence witnesses." Senator Biden made clear, however, that he was offering only "[e]xamples" of "corrupt persuasion," not an exhaustive catalog of covered conduct. See 134 Cong. Rec. 32,701 (1988).

[18] It seems questionable whether Congress would employ such an inelegant formulation as "knowingly * * * corruptly persuades," and it is uncertain what petitioner believes the term "knowingly" would add, since that term is ordinarily used to require only knowledge of the pertinent facts, see, *e.g.*, *Bryan* v. *United States*, 524 U.S. 184, 192-193 (1998), and the term "corruptly" already implies such a requirement.

that ignorance of the law generally is no defense to a criminal charge." *Ratzlaf* v. *United States*, 510 U.S. 135, 149 (1994). Petitioner does not cite a single case in which a court has interpreted the word "corruptly"—whether in Section 1512(b), another obstruction-of-justice statute, or any other federal criminal statute—to require proof that the defendant knew his conduct was unlawful.

In support of its definition, petitioner primarily relies (Br. 35-36 & n.35) on this Court's decision in *Ratzlaf*, *supra*. In that case, this Court construed the term "willfully" to require proof of specific knowledge of unlawfulness, on the ground that the act of currency structuring, absent such proof, was not "inevitably nefarious" or "invariably motivated by a desire to keep the Government in the dark." 510 U.S. at 145. Here, by contrast, under the lower courts' definition of "corruptly," the covered act of corruptly persuading another person to withhold testimony or withhold or alter documents *is* "inevitably nefarious," see pp. 26-29, *supra*, and the term "corruptly" itself connotes not only a desire to keep the government in the dark, but, more specifically, an intent to obstruct an official proceeding. Moreover, this case critically differs from *Ratzlaf* in at least three additional respects. First, this case involves the distinct statutory term "corruptly," not the term "willfully," which itself has been construed to require proof of specific knowledge of unlawfulness only in cases involving tax offenses, see, *e.g.*, *Cheek* v. *United States*, 498 U.S. 192, 199-200 (1991), or other highly technical regulatory offenses, see, *e.g.*, *Ratzlaf*, 510 U.S. at 138-140; cf. *Bryan* v. *United States*, 524 U.S. 184, 191-192 (1998) (interpreting "willfully" to require general knowledge of unlawfulness). Second, it is not necessary in this case to require proof of knowledge of unlawfulness in order to avoid rendering the term "corruptly" superfluous, see *Ratzlaf*, 510 U.S. at 140-141, because the lower courts' definition of "corruptly" to require an intent to obstruct justice achieves the same result, see p. 24, *supra*. Third, it is

not necessary to require proof of knowledge of unlawfulness in order to ensure that the term "corruptly" has a consistent meaning across several related statutory provisions, see *Ratzlaf*, 510 U.S. at 142-143; in fact, such a requirement would perversely assign a *different* meaning to the term "corruptly" in Section 1512(b) than it carries in related statutes such as Sections 1503 and 1505.

Finally, to the extent that petitioner argues that its "consciousness of wrongdoing" requirement can be satisfied by anything other than knowledge of unlawfulness, petitioner cites no authority construing *any* statutory language to impose such an amorphous mens rea requirement—much less construing the term "corruptly" in that fashion. Indeed, while petitioner relies on *Ratzlaf*, it disavows (Br. 37) the specific knowledge-of-illegality formulation in that case. But, it is far from clear how petitioner's broader "consciousness of wrongdoing" requirement would differ from the intent requirement actually imposed by the district court, since the jury's determination that petitioner acted with an "improper purpose" to "subvert, undermine, or impede the fact-finding ability of an official proceeding" would seemingly compel the conclusion that petitioner acted with at least some consciousness of wrongdoing. Cf. *Aguilar*, 515 U.S. at 617 (Scalia, J., concurring in part and dissenting in part) (noting that, "in the context of obstructing jury proceedings, any claim of ignorance of wrongdoing is incredible"). And the district court's instructions did not preclude petitioner from arguing to the jury that it did not believe that its conduct was wrongful (as opposed to unlawful). See J.A. 213. Therefore, whatever petitioner's alternative "consciousness of wrongdoing" definition may mean, apart from knowledge of unlawfulness, that definition should be rejected.

C. Neither The Rule Of Lenity, The Doctrine Of Constitutional Doubt, Nor Principles Of "Fair Warning" Justify Petitioner's Construction

1. Petitioner contends (Br. 37-38) that its definition is supported by the rule of lenity. That rule, however, "applies only if, after seizing everything from which aid can be derived, * * * [this Court] can make no more than a guess as to what Congress intended." *United States* v. *Wells*, 519 U.S. 482, 499 (1997) (citations and internal quotation marks omitted). As discussed above, see pp. 17-22, *supra*, the text and history of Section 1512(b)(2), together with the definition of the term "corruptly" in other statutory contexts, make clear that Congress intended the term "corruptly" to mean "with an improper purpose": that is, "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." This case is therefore not one in which, "after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute." *United States* v. *Shabani*, 513 U.S. 10, 17 (1994). And the rule of lenity cannot justify the adoption of a construction, such as petitioner's, of which the statutory text is not susceptible. See, *e.g.*, *Salinas*, 522 U.S. at 66.

2. Petitioner also invokes (Br. 40-42) the doctrine of constitutional doubt, contending for the first time in this litigation that, under the lower courts' definition of "corruptly," the "corruptly persuades" prohibition in Section 1512(b) would present serious First Amendment overbreadth concerns. The doctrine of constitutional doubt, however, like the rule of lenity, is inapplicable here because the statute is not ambiguous. See, *e.g.*, *Miller* v. *French*, 530 U.S. 327, 341 (2000). And petitioner could not validly invoke the doctrine of constitutional doubt here in any event, because the lower courts' construction of the statute presents no significant issue of overbreadth. For the statute to be overbroad, it would have to be shown that "[the statute's]

application to protected speech [is] 'substantial,' not only in an absolute sense, but also relative to the seope of the law's plainly legitimate applications." *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003). Petitioner cannot identify *any* specific examples of constitutionally protected speech that would be criminalized under the lower courts' construction, because there is no protected First Amendment right to persuade another person to withhold testimony or withhold or alter documents with an intent to obstruct justice.[19] Accordingly, the only court of appeals to have addressed a First Amendment challenge to Section 1512(b) has summarily rejected it, see *United States* v. *Thompson*, 76 F.3d 442, 452 (2d Cir. 1996), and this Court has rejected a constitutional-doubt challenge to a similar statute, see *Aguilar*, 515 U.S. at 605-606. Because petitioner fails to identify a grave concern with First Amendment overbreadth, the constitutional-doubt doctrine is inapposite here.

3. In addition to invoking the rule of lenity, petitioner appears to make a distinct claim (Br. 38-39) that it was denied due process because it failed to receive "fair warning" that its conduct was unlawful.[20] Petitioner cannot show, however, that Section 1512(b) "fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). At the time of petitioner's conduct,

---

[19] The cases on which petitioner relies (Br. 40-41 & n.40) are readily distinguishable because they involve (1) the act of petitioning the government, including the courts, see, *e.g.*, *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972); (2) conduct, such as a boycott or labor protest, that unquestionably has an expressive component, see, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 911-912 (1982); or (3) speech that criticizes judicial proceedings, see, *e.g.*, *Craig* v. *Harney*, 331 U.S. 367, 374-375 (1947).

[20] Petitioner's "fair warning" claim in this Court seemingly is not premised on the doctrine of constitutional doubt, because petitioner does not argue that *future* defendants would lack "fair warning" if the district court's definition were adopted. See, *e.g.*, Br. 39.

the term "corruptly" had long been defined, in the context of other obstruction-of-justice statutes, to require an intent to obstruct justice, see pp. 17-22, *supra*, and lower courts had held that a defendant acted "corruptly" under those statutes by destroying or withholding documents in order to interfere with a grand jury investigation, even if those documents were not yet under subpoena, see *United States* v. *Ruggiero*, 934 F.2d 440, 446 (2d Cir. 1991); *United States* v. *Gravely*, 840 F.2d 1156, 1160 (4th Cir. 1988); cf. *Wilder* v. *United States*, 143 F. 433, 442 (4th Cir. 1906), cert. denied, 204 U.S. 674 (1907) (holding that defendant cannot hide witnesses who are not yet under subpoena). And petitioner had ample notice that the term "corruptly" had the same definition in Section 1512(b) as in those other statutes, and thus that it was a criminal offense to persuade others to withhold or alter evidence in order to obstruct an impending federal investigation. See, *e.g.*, *United States* v. *Applewhaite*, 195 F.3d 679, 688 (3d Cir. 1999); *Shotts*, 145 F.3d at 1300-1301; *Thompson*, 76 F.3d at 452.[21]

All of petitioner's arguments for a narrowing construction of the term "corruptly" are predicated on the assumption that petitioner, and others similarly situated, lacked adequate warning that shredding documents in anticipation of a government investigation, with the intent of undermining

[21] Citing news reports on post-verdict interviews with jurors, petitioner contends (Br. 38-39 n.36) that it lacked fair warning because it was in fact "prosecuted for requesting edits to a draft memo": that is, for Nancy Temple's conduct in editing a draft internal memo to eliminate the (accurate) suggestion that petitioner viewed Enron's October 16 press release as "misleading." See p. 6 n.4, *supra*. Because those news reports are not in the record, see R. 1449-1452 (striking exhibits purporting to describe jurors' post-verdict statements under Federal Rule of Evidence 606(b)), petitioner's reference to them is inappropriate. Apart from those news reports, there is no reason to believe that the jury relied exclusively, or even primarily, on Temple's conduct. As petitioner itself asserted in post-trial briefing, "the government *never* suggested, either in the indictment or in its argument to the jury, that Ms. Temple's e-mail *itself* constituted an act of illegal obstruction." R. 1440.

that investigation's fact-finding mission, violated the criminal laws. But petitioner's prosecution under Section 1512 was based on a longstanding definition of "corruptly" that provides ample notice of the conduct prohibited. A party does not operate in good faith when it acts with the intent to persuade others to deprive a government investigation of evidence by shredding hoards of documents. A document retention policy that is honored mostly in the breach, and seized upon in the shadow of a government investigation for the purpose of frustrating an agency's fact-finding proceedings, cannot provide cover for that conduct. Although not every action that has the effect of temporarily or even permanently causing the loss of evidence violates Section 1512(b)(2), petitioner's frantic efforts to destroy evidence of its participation in matters that it knew were the likely target of a government investigation crossed well over the line. Petitioner had ample warning that its conduct was criminal, and the lower courts' definition of the term "corruptly" was consistent with established law.[22]

[22] If this Court were to conclude that the lower courts' definition of the term "corruptly" was erroneous, petitioner would be entitled only to a new trial, not an acquittal. Petitioner is not entitled to test the sufficiency of the evidence in the present record against any new legal standard that might be adopted. See, *e.g.*, *Lockhart* v. *Nelson*, 488 U.S. 33, 42 (1988). In any event, there was sufficient evidence in the record to support a guilty verdict under either of petitioner's alternative definitions: petitioner did persuade its employees to commit unlawful acts (*viz.*, destroying documents during a pending proceeding, in violation of 18 U.S.C. 1505), and petitioner was conscious of its wrongdoing. Petitioner's sole basis for contending (Br. 50 n.44) that an acquittal is appropriate is that a jury could not find that Nancy Temple had a "corrupt" purpose. That argument, however, rests on an erroneous interpretation of 18 U.S.C. 1515(c), see p. 33 n.15, *supra*, and petitioner does not attempt to account for the conduct of any of its other employees.

II. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY ON THE DEFINITION OF THE PHRASE "OFFICIAL PROCEEDING"

Petitioner claims (Br. 42-47, 48-50) that, even assuming that the district court correctly defined "corruptly" as "with an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," the district court (1) should have instructed the jury that the government was required to prove that the defendant believed that some particular official proceeding was likely to occur in the near future, and (2) should not have instructed the jury that an informal agency investigation could constitute an "official proceeding." To the extent that those claims are preserved, they lack merit.

A. Petitioner's Proposed "Nexus" Requirement Should Be Rejected

Petitioner first argues (Br. 42-44) that, in order to establish liability under the "corruptly persuades" prohibition in Section 1512(b), the government should have been required to show that "the defendant believed that some particular proceeding was likely to occur in the near future." That requirement, in turn, consists of two components: (1) that the defendant believed that an official proceeding was "likely to occur," and (2) that the defendant intended to obstruct "some particular proceeding." Each of those components should be rejected.

1. In the district court, petitioner did not request an instruction that the government was required to show that petitioner believed that an official proceeding was likely to occur in the near future.[23] And in the court of appeals,

[23] Petitioner did request an instruction defining an "official proceeding" as "one that is ongoing or has been scheduled to be commenced in the future." R. 148. That instruction, however, was correctly rejected by the lower courts on the ground that it "defie[d]" the language of 18 U.S.C. 1512(e)(1) (2000), which specifies that an official proceeding "need not be pending or about to be instituted at the time of the offense." Pet. App. 26a. In passing, petitioner asserts (Br. 44 n.42) that "a defendant who clearly explains why an instruction is incorrect need not guess precisely what instruction an appellate court will ultimately adopt." Petitioner, however, fails to identify any pertinent instruction that it "clearly explain[ed]" was incorrect, but that was in fact given. And merely "[o]ffering an alternative instruction alone is not enough" to preserve harmless error review; "the district court must be fully aware of the objecting party's position." *United States* v. *Williams*, 990 F.2d 507 (9th Cir.), cert. denied, 510 U.S. 926 (1993).

petitioner did not claim that the district court should have given such an instruction. Because petitioner's claim was neither pressed nor passed upon below, it is not properly presented here. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

Even assuming, however, that petitioner's claim has been preserved for review, petitioner cannot demonstrate that the failure to give its unrequested instruction was plainly erroneous. To obtain relief under Federal Rule of Criminal Procedure 52(b), petitioner must demonstrate that there has been error that is plain and that affects substantial rights. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *United States* v. *Olano*, 507 U.S. 725, 731 (1993). Even if those conditions are met, a court may exercise its discretion to notice the error only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467.

Petitioner fails to meet this standard. First, petitioner cannot demonstrate that the failure to give its instruction is "clearly" or "obviously" erroneous under existing law. See *Olano*, 507 U.S. at 734. Petitioner cites no authority for such an instruction, and there is no basis in existing law for engrafting a requirement that the defendant believed that an official proceeding was likely to occur onto either (1) the requirement that defendant acted "corruptly," that is, with "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," or (2) the requirement that the defendant acted with the specified statutory intent to

cause another person to withhold documents from, or alter documents for, an official proceeding. Adoption of such a requirement would also be unwarranted. A defendant can possess both of the requisite intents—an intent to obstruct justice and an intent to cause another person to withhold documents from an official proceeding—even if he believes that there is only a *possibility* that his underlying misconduct will be uncovered (and thus that an official proceeding will be commenced). And the statute expressly contemplates that an official proceeding "need not be pending or about to be instituted at the time of the offense" for liability to attach. See 18 U.S.C. 1512(e)(1) (2000). The fact that Congress decided not to impose an *objective* requirement that an official proceeding must be "pending or about to be instituted" at the time of the offense strongly indicates that Congress did not intend to impose a *subjective* requirement that the defendant must have *believed* that an official proceeding was "likely to occur in the near future" at the time of the offense.[24]

[24] Petitioner heavily relies (Br. 43-44) on this Court's decision in *Aguilar*, *supra*. The "nexus" requirement imposed by this Court in *Aguilar*, however, is quite different from the mislabeled "nexus" requirement proposed by petitioner. In *Aguilar*, the Court held that, to convict a defendant under the "omnibus" clause of Section 1503, the government must show that the defendant's action would have the natural and probable effect of obstructing a judicial proceeding. See 515 U.S. at 599-600. *Aguilar*'s nexus requirement, however, did not provide that the defendant must believe that a judicial proceeding was *likely*; in the context of Section 1503, it was long settled that the defendant must know that a judicial proceeding was *ongoing*. See *Pettibone* v. *United States*, 148 U.S. 197, 207 (1893). As for the *Aguilar* nexus requirement itself: petitioner did not seek an instruction, and does not contend here, that the government was required to prove that its actions had the "natural and probable effect" of obstructing an official proceeding. One court of appeals has rejected such a "nexus" requirement in a Section 1512(b) prosecution. See *United States* v. *Gabriel*, 125 F.3d 89, 102-105 (2d Cir. 1997); but cf. *Davis*, 183 F.3d at 248 (imposing "nexus" requirement without elaboration). In any event, any failure to impose a separate "nexus" requirement in this case could not have prejudiced petitioner, because the wholesale

Second, petitioner cannot demonstrate that any error affected its substantial rights. Nothing in the district court's instructions foreclosed petitioner from arguing to the jury (1) that it believed that an official proceeding was not likely, and (2) that such a belief tended to show that it lacked an intent to obstruct justice or an intent to cause another person to withhold documents from an official proceeding. If justified by the facts, such an argument might be influential with a jury: a jury might conclude that a defendant who believes that an official proceeding is improbable would be less likely to have the improper intent to obstruct it. But the evidence here clearly demonstrated that petitioner believed that an official proceeding was likely to occur in the near future (or indeed had already begun, see pp. 47-50, *infra*) when its employees were instructed to destroy Enron-related documents. As early as October 9, Nancy Temple believed that an SEC investigation was "highly probable," and petitioner was informed of the SEC's informal investigation on October 19—before many of the most damning acts of "corrupt persuasion" took place. J.A. 93; Pet. App. 6a; Tr. 1850.[25]

2. Although petitioner did preserve its claim that the government should be required to show that the defendant

destruction of thousands of documents plainly had the "natural and probable effect" of interfering with any investigation that petitioner had the intention of obstructing.

[25] Other critical pieces of evidence demonstrating that petitioner believed that an official proceeding was likely to occur in the near future were (1) the certainty that, at a minimum, Enron would have to restate its assets to correct the $1.2 billion accounting error; (2) the strong possibility that Enron would have to restate its earnings because of its treatment of the Raptors; (3) Enron's announcement of a $1.01 billion charge to its current earnings; (4) Sherron Watkins's warnings that Enron could "implode in a wave of accounting scandals"; (5) petitioner's awareness that it had sanctioned Enron's use of highly aggressive accounting practices; (6) the rapidly declining value of Enron's stock; and (7) petitioner's probationary status with the SEC. See generally pp. 1-10, *supra* (discussing these and other pieces of evidence).

intended to obstruct "some particular proceeding," that claim lacks merit. By its terms, Section 1512(b)(2)(A) and (B) requires a defendant to have, *inter alia*, the intent to cause another person to withhold documents from, or alter documents for, "*an* official proceeding" (emphasis added), not some particular proceeding. In light of the fact that a defendant can be liable even if no proceeding is pending or about to be instituted at the time of the offense, see 18 U.S.C. 1512(e)(1) (2000), that lack of specificity is hardly surprising. By definition, when an official proceeding is not yet pending, it will be impossible for a defendant to know any specifics about that (as-yet hypothetical) proceeding; all a defendant can know is that there is a possibility (or, as here, a probability) that a specific *matter* will give rise to a proceeding in the future. Indeed, even when a proceeding is pending, the government is expressly not required to prove that the defendant was aware that the proceeding is a federal one. See 18 U.S.C. 1512(f)(1) (2000) (now codified at 18 U.S.C. 1512(g)(1) (Supp. II 2002)).

Even if an instruction that the government was required to show that the defendant intended to obstruct "some particular proceeding" was warranted, petitioner suffered no prejudice from the failure to give it. As the court of appeals noted, it was "clear at every step" "[t]hat the SEC was the feared opponent and initiator of a proceeding and not some other shadowy opponent." Pet. App. 28a. Indeed, petitioner acknowledged in the district court that "the evidence in this case suggests that the only proceeding that could have been affected is one involving the SEC." Tr. 6295. Because the government did show that petitioner intended to obstruct some particular proceeding—namely, an investigation by the SEC of petitioner's Enron-related work—any instructional

error in this regard was harmless. See *Neder* v. *United States*, 527 U.S. 1, 7-15 (1999).[26]

B. Petitioner's Challenge To The District Court's "Official Proceeding" Instruction Should Be Rejected

Finally, petitioner argues (Br. 44-47) that the district court erred by instructing the jury that an informal SEC investigation (*i.e.*, an investigation that has not been ordered by members of the Commission) could constitute an "official proceeding." That argument, too, lacks merit.

1. As an initial matter, petitioner failed to preserve that issue in the court of appeals. In its lengthy opening brief in that court, petitioner did not list the issue in its statement of issues presented for review, and mentioned the issue only in a single footnote. See Pet. C.A. Br. 70 n.24. The government therefore contended that the issue had been waived. See Gov't C.A. Br. 92 n.34. The court of appeals evidently agreed, because it declined to address the issue in its opinion. See Pet. App. 2a. Because the issue was not pressed or passed upon below, it should not be considered here. See *Williams*, 504 U.S. at 41.

2. In any event, petitioner's claim fails on the merits. Section 1515(a)(1) defines an "official proceeding" for purposes of Section 1512 as, *inter alia*, "a proceeding before a Federal Government agency which is authorized by law." Petitioner cites no authority holding that an informal SEC

---

[26] Although petitioner suggests (Br. 49) that the jury may have found it guilty it based solely on its adoption of a document policy, the record belies that claim. The indictment charged petitioner only with a scheme to destroy Enron-related documents, and the government's trial evidence proved that scheme. The evidence established that petitioner used its spottily invoked document policy as a pretext for purging its files in anticipation of an SEC investigation—in violation of the policy itself. And in closing argument, the government expressly informed the jury that "there's nothing criminal about having a document policy." Tr. 6419. As the court of appeals concluded, therefore, "[t]here was no risk of conviction for innocent maintenance of a records program." Pet. App. 28a.

investigation does not qualify as an "official proceeding" under that definition. In expressly authorizing the SEC to conduct investigations, Congress treated all investigations as "proceedings." See, *e.g.*, 15 U.S.C. 78u(a) (authorizing investigations); 15 U.S.C. 78u(b) (authorizing compulsory process "[f]or the purpose of any such investigation, or any *other* proceeding under this chapter") (emphasis added). The SEC's own regulations, in turn, contemplate both formal and informal investigations. See, *e.g.*, 17 C.F.R. 202.5(a). Under the plain language of Section 1515(a)(1), therefore, an informal SEC investigation qualifies as an "official proceeding."[27]

Defining "proceeding" to include an informal SEC investigation for purposes of Section 1512 is consistent with the way in which courts have defined the parallel term "proceeding" for purposes of Section 1505. Lower courts have long considered agency investigations, even preliminary ones, to be "proceedings" under that statute. See *United States* v. *Leo*, 941 F.2d 181, 199 (3d Cir. 1991); *United States* v. *Browning, Inc.*, 572 F.2d 720, 723-724 (10th Cir.), cert. denied, 439 U.S. 822 (1978); *United States* v. *Fruchtman*, 421 F.2d 1019, 1021 (6th Cir.), cert. denied, 400 U.S. 849 (1970); *Rice* v. *United States*, 356 F.2d 709, 712-713 (8th Cir. 1966). Just as it is reasonable to give the term "corruptly" the same well-established meaning in Section 1512(b) that it had in earlier-enacted Section 1503, so too is it reasonable to give the term "proceeding" the same meaning in Section 1512 as in Section 1505. See pp. 20-22, *supra*.

Petitioner contends (Br. 46) that "the line between a simple staff investigation and a true proceeding 'before' a

[27] Petitioner's suggestion (Br. 46) that the SEC's own regulations define "proceedings" to exclude informal investigations is incorrect. The regulations on which petitioner relies are applicable only "[f]or purposes of [the SEC's] Rules of Practice," 17 C.F.R. 201.101(a), which generally govern only adjudicatory proceedings and affirmatively provide that they "do not apply" to investigations, except where specifically indicated, 17 C.F.R. 201.100(b)(1).

federal agency turns on the power to subpoena documents and compel testimony." But where an agency has subpoena power, as the SEC does, even the early stages of an investigation form part of an "official proceeding." Courts considering the meaning of the term "proceeding" in Section 1505 have not limited it to those aspects of an agency's investigation that are conducted under the authority to issue subpoenas and administer oaths. See, *e.g.*, *United States* v. *Senffner*, 280 F.3d 755, 761 (7th Cir.) (noting that "the authority to issue subpoenas and administer oaths" is sufficient to give rise to a "proceeding," but adding that "that does not mean that every aspect of the investigation must proceed under that authority"), cert. denied, 536 U.S. 934 (2002); *Browning, Inc.*, 572 F.2d at 724 (concluding that "[w]e do not see that the use of this machinery [*i.e.*, the regulatory authority to administer oaths] would have made the proceeding more like a 'proceeding' simply by virtue of the issuing of a subpoena formally or the giving notice of a preliminary investigation").[28] There is nothing talismanic about the point at which an agency's staff is formally authorized to exercise the agency's ever-present subpoena power, and none of the cases on which petitioner relies draws such a distinction. See *Senffner*, 280 F.3d at 761; *United States* v. *Kelley*, 36 F.3d 1118, 1127 (D.C. Cir. 1994); *United States* v. *Batten*, 226 F. Supp. 492, 494 (D.D.C. 1964), cert. denied, 380 U.S. 912 (1965). Under petitioner's interpretation, the coverage of Section 1512 would turn on an inquiry into an agency's own regulations concerning the use of its subpoena power. There is no reason to believe that Congress intended to require such an agency-by-agency inquiry, and petitioner's interpretation would create perverse incentives for

[28] *Frutchman*, *supra*, involved an investigation conducted by a single attorney from the Federal Trade Commission. See 421 F.2d at 1021. Regulations then in effect stated that only the Commission itself had the power to issue subpoenas. See 27 Fed. Reg. 4609, 4610 (1962).

an agency to dispense with controls on the use of its subpoena power.[29]

3. Finally, even if an informal SEC investigation does not constitute an "official proceeding" for purposes of Section 1512, any instructional error by the district court on that issue was harmless. The jury found that petitioner acted with "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," and petitioner does not contest the sufficiency of the evidence supporting that finding. See Pet. 4. Petitioner cannot seriously argue that it acted with the intent to obstruct an *informal* SEC investigation that it knew was likely or underway, but without the ultimate intent to obstruct any *formal* SEC investigation that might follow from that informal investigation. By persuading its employees to destroy thousands of documents concerning a major accounting scandal in anticipation of an SEC investigation, petitioner violated Section 1512(b)(2)(A) and (B). Its conviction should therefore be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

---

[29] Contrary to petitioner's contention (Br. 45-46), the district court's definition of the phrase "official proceeding" does not blur the statutory distinction between obstruction of official proceedings and interference with the communication of information to law-enforcement officers. Unlike agencies such as the SEC, law-enforcement officers ordinarily do not have the power to subpoena witnesses and do not make prosecutorial decisions, and mere police investigations thus ordinarily would not qualify as "official proceedings."

PAUL D. CLEMENT
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

KANNON K. SHANMUGAM
Assistant to the Solicitor General

ELIZABETH D. COLLERY
SANGITA K. RAO
ANDREW WEISSMANN
MATTHEW W. FRIEDRICH
Attorneys

MARCH 2005

APPENDIX

1. Title 18 of the United States Code provides in pertinent part:

§ 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined under this title or imprisoned not more than five years, or both.

§ 1512 [2000]. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is—

(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112; and

(B) in the case of an attempt, imprisonment for not more than twenty years.

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

(d) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(e) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(f) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(g) There is extraterritorial Federal jurisdiction over an offense under this section.

(h) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding

(whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(i) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

§ 1512 [2000 & Supp II 2002]. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to—

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112;

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person;

imprisonment for not more than 20 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 10 years.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever corruptly—

---

[1] So in original.

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

---

[1] So in original.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

§ 1515. Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section—

(1) the term "official proceeding" means—

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(B) a proceeding before the Congress;

(C) a proceeding before a Federal Government agency which is authorized by law; or

(D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

(2) the term "physical force" means physical action against another, and includes confinement;

(3) the term "misleading conduct" means—

(A) knowingly making a false statement;

(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(E) knowingly using a trick, scheme, or device with intent to mislead;

(4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant—

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

(B) serving as a probation or pretrial services officer under this title;

(5) the term "bodily injury" means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary; and

(6) the term "corruptly persuades" does not include conduct which would be misleading conduct but for a lack of a state of mind.

(b) As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

(c) This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.

§ 1519 [Supp. II 2002]. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

§ 1520 [Supp. II 2002]. Destruction of corporate audit records

(a)(1) Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies, shall maintain all audit or review workpapers for a period of 5

years from the end of the fiscal period in which the audit or review was concluded.

(2) The Securities and Exchange Commission shall promulgate, within 180 days, after adequate notice and an opportunity for comment, such rules and regulations, as are reasonably necessary, relating to the retention of relevant records such as workpapers, documents that form the basis of an audit or review, memoranda, correspondence, communications, other documents, and records (including electronic records) which are created, sent, or received in connection with an audit or review and contain conclusions, opinions, analyses, or financial data relating to such an audit or review, which is conducted by any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies. The Commission may, from time to time, amend or supplement the rules and regulations that it is required to promulgate under this section, after adequate notice and an opportunity for comment, in order to ensure that such rules and regulations adequately comport with the purposes of this section.

(b) Whoever knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), shall be fined under this title, imprisoned not more than 10 years, or both.

(c) Nothing in this section shall be deemed to diminish or relieve any person of any other duty or obligation imposed by Federal or State law or regulation to maintain, or refrain from destroying, any document.

2. Title 15 of the United States Code provides in pertinent part:

§ 78u [2000 & Supp. II 2002]. Investigations and actions

(a) Authority and discretion of Commission to investigate violations

(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(2) On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the

requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States.

(b) Attendance of witnesses; production of records

For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

* * * * *

3. Title 17 of the Code of Federal Regulations provides in pertinent part:

§ 202.5 Enforcement activities.

(a) Where, from complaints received from members of the public, communications from Federal or State agencies, examination of filings made with the Commission, or otherwise, it appears that there may be violation of the acts administered by the Commission or the rules or regulations thereunder, a preliminary investigation is generally made. In such preliminary investigation no process is issued or testimony compelled. The Commission may, in its discretion, make such formal investigations and authorize the use of process as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or the rules of a self-regulatory organization of which the person is a member or participant. Unless otherwise ordered by the Commission, the investigation or examination is non-public and the reports thereon are for staff and Commission use only.

* * * * *